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1125  
No. 3076

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United States  
1 1125  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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AMERICAN MANGANESE STEEL COMPANY,  
a Corporation,

Appellant,

VS.

ALASKA MINES CORPORATION, a Corpora-  
tion,

Appellee.

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**Transcript of Record.**


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Upon Appeal from the United States District Court for  
the District of Alaska, Second Division.

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FILED  
DEC 6 - 1917  
F. D. MUNKTON,  
CLERK.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

WILLIAM A. GILMORE, Seattle, Wash.

T. M. REED, Nome, Alaska,

Attorneys for Plaintiff.

O. D. COCHRAN, Nome, Alaska,

LYONS & ORTON, Nome, Alaska,

F. T. MERRITT, Seattle, Wash.,

Attorneys for Defendant, Alaska Mines  
Corporation.

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*In the District Court for the District of Alaska, Sec-  
ond Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY,  
Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corpora-  
tion, NOME CONSOLIDATED DREDG-  
ING COMPANY, a Corporation, ALASKA  
DREDGING COMPANY, a Corporation, E.  
E. POWELL, GEORGE D. SCHOFIELD,  
J. M. SLOAN, E. L. WEBSTER, M. W.  
NEWTON, LOUIS EISENLOHR, F. H.  
THATCHER, Trustee, C. E. DARLING,  
Trustee, and E. E. POWELL, Trustee,  
Defendants.

**Bill of Exceptions.**

BE IT REMEMBERED that on the 10th day of  
July, 1917, complaint was filed herein in words and  
figures as follows (title of court and cause are

omitted in all papers herein contained, being in all cases the same as the title of the court and cause of this Bill of Exceptions):

(Title of Court and Cause.)

### **Complaint.**

The plaintiff, addressing its complaint to the Honorable Judge of the above-entitled court, alleges as its cause of action against the defendants as follows:

#### **I.**

That the plaintiff is a corporation duly incorporated under the laws of the State of Maine, and having its principal place of business in Chicago in the State of Illinois, and the defendants, Nome Consolidated Dredging Company and the Alaska Dredging Company, are each corporations organized and existing under the laws of the State of Washington, and doing business [1\*] in the said Territory of Alaska; that the Alaska Mines Corporation is a corporation organized under the laws of the State of Virginia and doing a mining business in the Territory of Alaska; and the defendant E. E. Powell is, and was, at all the times herein mentioned, vice-president and general manager of the Nome Consolidated Dredging Company, and during all of the said times was and is treasurer and general manager and a principal stockholder of the defendant Alaska Dredging Company and at all times herein mentioned and now, the said E. E. Powell, and his brothers associated with him, own and control two-thirds of the capital

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\*Page-number appearing at foot of page of original certified Transcript of Record.



stock of the said Alaska Dredging Company; that the defendant M. W. Newton was at all times herein mentioned, and is, the president of the said defendant Nome Consolidated Dredging Company and one of its principal stockholders; and the said defendants E. L. Webster and Louis Eisenlohr were, during all of the times herein mentioned and referred to, directors and principal stockholders in the defendant Nome Consolidated Dredging Company; that during all of the said times mentioned and herein referred to, defendant George D. Schofield was the general counsel and attorney at Nome, Alaska, of the defendants Nome Consolidated Dredging Company, Alaska Dredging Company, and E. E. Powell personally and as trustee.

## II.

That the defendant Nome Consolidated Dredging Company was at and prior to the 14th day of September, 1914, indebted to this plaintiff in the sum of Twenty-five Thousand (\$25,000.00) Dollars and interest thereon, for machinery, steel and dredge equipment theretofore delivered to and used by it in its mining operations in the Nome Mining District, Alaska, which said indebtedness was evidenced by certain promissory notes executed by the said defendant Nome Consolidated Dredging Company and endorsed to the plaintiff herein, and on the 14th day of September, 1914, an action was pending in the Court of Common Pleas for the City [2] and County of Philadelphia, State of Pennsylvania, for the recovery of the amount due on said promissory notes, which were then long past due and unpaid,

which said action was entitled American Manganese Steel Company, a Corporation, Plaintiff, versus Nome Consolidated Dredging Company, a corporation, Defendant; that such proceedings were had in said action in the said Court of Common Pleas that on the 8th day of June, 1916, a judgment was recovered by this plaintiff against the Nome Consolidated Dredging Company, for the sum of Thirty Thousand Nine Hundred and Twenty (\$30,920.00) Dollars with interest and costs; that thereafter the said American Manganese Steel Company, plaintiff herein, brought action in the District Court for the District of Alaska, Second Division, being cause No. 2686, entitled American Manganese Steel Company, a Corporation, Plaintiff, versus Nome Consolidated Dredging Company, a Corporation, Defendant, on said judgment so recovered against the aforesaid Nome Consolidated Dredging Company, and on the 4th day of October, 1916, in said action in said District Court, recovered judgment against said Nome Consolidated Dredging Company in the sum of Thirty Thousand Nine Hundred Twenty (\$30,920.00) Dollars with interest and costs, and thereafter plaintiff caused an execution to be issued in said action on said judgment and the same was returned *nulla bona* by the United States Marshal for the Territory of Alaska, Second Division, and the said judgment now remains unpaid and unsatisfied, and said judgment debtor is wholly insolvent by reason of the acts and things hereinafter recited and set forth.

### III.

That on the 14th day of September, 1914, and

while said defendant Nome Consolidated Dredging Company was so indebted to this plaintiff as above alleged, it, the said Nome Consolidated Dredging Company, by and through the aforesaid E. E. Powell, acting [3] as vice-president and general manager, made, executed and delivered to one F. H. Thatcher, trustee, defendant herein, a certain trust deed or mortgage, which is hereafter referred to as the Thatcher mortgage, thereby conveying to said defendant F. H. Thatcher, all its, the said Nome Consolidated Company's real and personal property, to secure an issue of promissory notes aggregating the sum of Twenty-five Thousand (\$25,000.00) Dollars, which said promissory notes consist of a series of thirty-seven (37) notes numbered consecutively, seven (7) of said notes purporting to be delivered to the Alaska Banking & Safe Deposit Company, a corporation, of Nome, Alaska, of which corporation said Thatcher was manager and principal officer, sixteen (16) of said notes, aggregating the sum of Seventy-eight Hundred Seventeen and 24/100 (\$7817.24) Dollars purported to be delivered to the mortgagor, Nome Consolidated Dredging Company, seven (7) of said notes aggregating the sum of Thirty-five Hundred (\$3500.00) Dollars purporting to be delivered to the defendant M. W. Newton, two (2) of said notes, aggregating the sum of One Thousand (\$1,000.00) Dollars purporting to be delivered to the defendant Louis Eisenlohr, four (4) of said notes aggregating the sum of Two Thousand (\$2,000.00) Dollars purporting to be delivered to the defendant E. L. Webster, and one (1) of said notes



purporting to be delivered to the defendant J. M. Sloan; that in truth and in fact all of said notes were delivered and held by the defendant E. E. Powell for the purposes hereinafter set forth and alleged; that the said Alaska Banking & Safe Deposit Company was paid in full by said defendant E. E. Powell, as general manager of the defendant Nome Consolidated Dredging Company all money, sums and amounts so secured by said Thatcher mortgage, long prior to the commencement of the foreclosure of said mortgage hereinafter set forth, and at the time of said foreclosure and when the same was commenced in the name [4] of said Thatcher as trustee, said indebtedness to said bank had been fully paid and the notes delivered to said E. E. Powell, and said bank had no interest whatever in said foreclosure proceedings; that on the 16th day of September, 1914, and only two days after said Thatcher mortgage was executed and delivered, the said Nome Consolidated Dredging Company, acting again by and through said defendant E. E. Powell, its vice-president and general manager, with intent to defraud its creditors, and particularly this plaintiff, who was then litigating its claim in the Court of Pennsylvania, as above alleged, and with the further intent to prefer certain of its officers, agents and stockholders as preferred creditors as against this plaintiff, made, executed and delivered to one J. M. Sloan, as trustee, its certain trust deed hereinafter referred to as the Sloan mortgage, conveying all the real and personal property of every nature whatsoever belonging to the said Nome Con-

solidated Dredging Company to the said J. M. Sloan as trustee, as security for the payment of a series of alleged promissory notes aggregating the sum of Two Hundred Thousand Dollars (\$200,000.00), which said alleged promissory notes were issued in a series and numbered from one (1) to seventy (70) consecutively; the said notes secured by said Sloan mortgage were, by the said trustee, pretended and alleged to be delivered as follows: Four (4) of said notes numbered 1, 34, 64 and 65 were pretended and alleged to be delivered to the defendant Louis Eisenlohr, an officer and stockholder of said mortgagor; fourteen (14) of said notes numbered 36, 37, 38, 39, 40, 49, 50, 58, 59, 60, 61, 62, and 63 aggregating the sum of Fifty-seven Thousand Six Hundred Three and 52/100 (\$57,603.52) Dollars, were pretended and alleged to be delivered to the defendant M. N. Newton, the president and a stockholder of said mortgagor; the remainder of said promissory notes, aggregating the sum of One Hundred Twenty-nine Thousand Three Hundred Forty-five and 63/100 (\$129,345.63) Dollars were pretended [5] and alleged to be delivered to the defendant Alaska Dredging Company above mentioned, said corporation being officered, owned and controlled by the said defendant E. E. Powell as above alleged; that in truth and in fact none of said notes were ever delivered but at all times were spurious and worthless and were held and kept in the possession of said E. E. Powell to further the plan, scheme and conspiracy to defraud this plaintiff as hereinafter alleged.

## IV.

That prior to September, 1914, the defendant E. E. Powell entered into a plan, scheme and conspiracy with the defendants M. W. Newton, Louis Eisenlohr, E. L. Webster, George D. Schofield, the Alaska Dredging Company and others unknown to this plaintiff, whereby it was understood and agreed between them that said Thatcher mortgage and said Sloan mortgage should be made, executed and recorded and thereafter foreclosure proceedings instituted and all of the assets, real and personal, of the Nome Consolidated Dredging Company, sold so as to preclude any creditor, and particularly this plaintiff, from recovering, and to shut out all stockholders save and except the favored few who were to participate in the result of said scheme and conspiracy; that at said time it was further agreed and understood that said defendant E. E. Powell should act as the trustee of all of said persons so scheming and conspiring, and that said E. E. Powell should thereafter begin foreclosure proceedings in the District Court at Nome, and at a subsequent sale bid in all of the assets of the said defendant Nome Consolidated Dredging Company as their trustee, and that thereafter they were to organize a new company to take over the title by bill of sale and deed from said E. E. Powell as trustee, and operate the dredges, machines and mines of the said Nome Consolidated Dredging Company and participate in the ownership [6] of the stock and management in such corporation when so organized.



## V.

That at the time of the making of the said Thatcher mortgage and the said Sloan mortgage in September, 1914, the said Nome Consolidated Dredging Company was wholly insolvent and was unable to pay its just debts and liabilities and that the defendants E. E. Powell, M. W. Newton, Louis Eisenlohr, E. L. Webster, George D. Schofield, and the said Alaska Dredging Company, well knew that at said time the said Nome Consolidated Dredging Company was insolvent and unable to pay its just debts and liabilities and he, the aforesaid E. E. Powell, while acting as vice-president and general manager of the said defendant Nome Consolidated Dredging Company, then and there planned, schemed and conspired with said M. W. Newton, Louis Eisenlohr, E. L. Webster and the Alaska Dredging Company to fraudulently prefer each of them to other creditors of said Nome Consolidated Dredging Company and particularly as against this plaintiff; that in pursuance of said plan, scheme and conspiracy said defendant E. E. Powell caused said Thatcher mortgage and said Sloan mortgage to be made, executed, delivered and recorded, thereby intending to cover all real and personal property belonging to the Nome Consolidated Dredging Company with liens to prevent this plaintiff, an unsecured creditor, from recovering its just claim from the assets of said debtor company.

## VI.

That thereafter, pursuant to said scheme, the said E. E. Powell, on the 24th day of June, 1915, in the

name of said F. H. Thatcher, trustee, and in his own name as trustee and individually, and others, as plaintiffs, brought suit in the District Court for the District of Alaska, Second Division, being cause No. 2608, [7] entitled F. H. Thatcher, trustee, E. E. Powell, George D. Schofield, E. L. Webster, J. M. Sloan, and E. E. Powell, trustee, plaintiffs, versus Nome Consolidated Dredging Company, a corporation, and C. E. Darling, trustee, defendants, for the foreclosure of the said Thatcher mortgage; that immediately after said suit was commenced by said Powell he thereupon, as general manager of said defendant Nome Consolidated Dredging Company, employed an attorney who appeared and filed an answer in said cause, and said E. E. Powell, also employed an attorney to represent said C. E. Darling, trustee, whom he had substituted for said J. M. Sloan mentioned in said mortgage and caused said attorney to appear and file a cross complaint and answer in said suit; that said E. E. Powell, acting for all the parties and directing the proceedings for the plaintiffs, the defendants and the cross-complainants, in conformity with his scheme, plan and conspiracy to defraud the creditors of said Nome Consolidated Dredging Company, and particularly this plaintiff, caused his various counsel and attorneys to stipulate the said cause for trial immediately so that the said suit was brought on for trial before the court within seven days from the date it was commenced, to wit, on the first day of July, 1915; said Powell had entered, without objection, a decree of foreclosure prepared by his per-

sonal attorney, a copy of which decree is hereto annexed, marked Exhibit "A" and made a part hereof, which said decree, by its terms, ordered and directed a sale of all the property, real and personal, of the said Nome Consolidated Dredging Company, within the District of Alaska, to satisfy the amounts alleged to be due on the several series of notes mentioned in both of said mortgages above described, and as part and parcel of said scheme and conspiracy said Powell caused his said attorneys to prepare said decree so that said spurious and worthless notes could be used by him in bidding in said assets at the marshal's [8] sale, thereby preventing any *bona fide* bidders from bidding at said sale; that immediately thereafter said property was sold on execution by the United States marshal for the Second Division of the Territory of Alaska, and the said E. E. Powell, in conformity with his said scheme and conspiracy, bid in all the personal property of said Nome Consolidated Dredging Company, for the sum of Twenty Thousand (\$20,000.00) Dollars, and all its realty for the sum of Three Thousand (\$3,000.00) Dollars, as shown by the said marshal's return to said execution, a copy of which return is hereunto annexed, marked Exhibit "B" and made a part hereof; that at said sales appeared several *bona fide* purchasers financially able and willing to bid on said property for cash, but it was impossible for them to compete with the said Powell who was using said spurious and worthless notes under the terms of said decree, in paying for his bids made at said sales; that said Powell purchased



all of said assets of the said Nome Consolidated Dredging Company as trustee for himself and his other stockholders and conspirators, and took title at such sales, from the said marshal as such trustee for the use and benefit of said stockholders and conspirators and with intent to hinder, delay and defraud this plaintiff and other creditors and the other stockholders who were not in on said scheme so planned and carried out by said Powell.

#### VII.

That thereafter the said Powell caused a concern to be organized in conformity with such scheme and plan, called the Nome Holding Company, and attempted to carry out the said scheme and thereafter the said M. W. Newton, Louis Eisenlohr, E. L. Webster, the Alaska Dredging Company and said E. E. Powell, in conformity with said plan and scheme, organized the said defendant Alaska Mines Corporation, a corporation, defendant [9] above named, and with full knowledge on the part of all concerned of the fraud perpetrated upon this plaintiff and other creditors of the said Nome Consolidated Dredging Company and its innocent stockholders, transferred all of said assets, both real and personal, described in said decree above set forth, to said newly organized concern, and the said defendant Alaska Mines Corporation, thereupon took possession of all of said assets and claims to be the owner and holder thereof and entitled to the possession; that all of the stock of said new concern was subscribed and divided between said schemers and conspirators who proceeded to elect themselves and

their employees as directors and officers of said concern to manage and control the said dredges, machines and mines mentioned and described in said decree; that on the 8th day of October, 1915, the said E. E. Powell, while still acting as general manager and vice-president of the said Nome Consolidated Dredging Company, and after he had bid in all the said assets, real and personal, of the said Nome Consolidated Dredging Company, and while operating the same as trustee, made a statement under oath and filed, or caused the same to be filed with the clerk of the above-entitled court, a copy of which is hereunto annexed and marked Exhibit "C" and made a part hereof, wherein the said E. E. Powell swore that on the 30th day of June, 1915, being the day before said foreclosure trial, that the assets of said Nome Consolidated Dredging Company were far in excess of all its debts and liabilities and of the total value of \$670,906.31, but that notwithstanding, he, the said Powell, conspired and conducted said foreclosure proceedings in such a way and manner by the use of said spurious and worthless notes, and otherwise, so that all of said assets were confiscated by him and subsequently assigned and transferred to the defendant the Alaska Mines Corporation, in fraud of the rights of this plaintiff [10] who was then a creditor of said Nome Consolidated Dredging Company.

#### VIII.

That the said defendant E. E. Powell, as trustee, immediately after said sales above mentioned, took possession of all of the said assets of the defendant

Nome Consolidated Dredging Company and operated the dredges and mines during the remainder of the season of 1915, and he and his said co-conspirators and schemers refused to longer recognize the Nome Consolidated Dredging Company as the owner of said assets, real and personal, and for his own use and the use of his co-conspirators, kept and retained the proceeds of the said mining operations for the year 1915; that thereafter and during the year 1916 the defendant Alaska Mines Corporation was organized by the said defendants E. E. Powell, M. W. Newton, Louis Eisenlohr, E. L. Webster and the Alaska Dredging Company, with full knowledge and notice of the rights of this plaintiff as a creditor of said defendant Nome Consolidated Dredging Company, and the said E. E. Powell thereupon transferred by contract, bill of sale and deed, all of said assets, real and personal, belonging to the said Nome Consolidated Dredging Company, to the defendant Alaska Mines Corporation, and the said defendant Alaska Mines Corporation thereupon entered into the possession of the dredges, machinery, mining claims and mines and other equipment belonging to the said Nome Consolidated Dredging Company, and began to use the same in conducting mining operations on said mining claims and in said mines; that the said mining claims mentioned and described in said decree are valuable only for the gold therein contained, and when said gold is mined therefrom, will be rendered worthless; that said machinery and equipment is being used by the said defendant Alaska Mines Corporation and by reason thereof is being worn and



depreciated and in time will be rendered valueless; that [11] the said defendant Alaska Mines Corporation, claiming to be the owner of said assets set out and mentioned in said decree, threaten to dispose of the same for their own use and benefit, refusing at all times to recognize any right, title or interest therein in the said Nome Consolidated Dredging Company.

### IX.

That this judgment creditor has exhausted all of its legal remedies against the said Nome Consolidated Dredging Company and is unable to collect its judgment, or any part thereof, by legal process; that plaintiff has no other remedy other than this equitable cause to subject the said assets to the payment of its claim, and in order to reserve and protect the said property *pendente lite*, it is necessary for the Court to appoint a receiver to take possession of all of said assets, real and personal, and preserve the same for distribution as hereinafter prayed for.

WHEREFORE plaintiff prays the Court for the following relief:

First: For the appointment of a receiver *pendente lite* to take possession and control and safely keep all of the assets, real and personal, mentioned and described in the decree hereunto annexed, marked Exhibit "A" and made a part of this complaint.

Second: That the Court enter a final decree herein adjudging and decreeing that the said mortgages, known as the Thatcher mortgage and the Sloan mortgage, were and are fraudulent and void as

against this plaintiff, and any other creditors or innocent stockholders, and that the said decree of foreclosure made and entered on the first day of July, 1915, and the several sales made and held thereunder, be canceled, annulled and set aside and held for naught.

Third: That upon the final hearing of this cause the said [12] receiver be made permanent and that he be directed to take possession and control of all of the said assets, real and personal, belonging to the Nome Consolidated Dredging Company, as described in the said decree, marked Exhibit "A" hereof, and that said receiver be authorized and empowered to wind up the affairs of said Nome Consolidated Dredging Company and pay its just debts and liabilities from the proceeds of the sale of said assets, including the judgment of this plaintiff.

Fourth: That upon the final hearing of this cause, should the Court find and determine that said defendants fraudulently schemed and conspired to make the sale of all of the assets, real and personal, belonging to the Nome Consolidated Dredging Company by and through said foreclosure proceedings, as alleged by the plaintiff herein, and further find that the said defendant Alaska Mines Corporation was organized by said conspirators with full knowledge and notice of the claim and rights of the plaintiff herein, and the Court deems it more equitable not to set aside said decree of foreclosure and the sales thereunder, then the plaintiff prays the Court to render a judgment or decree in favor of the plaintiff against the said E. E. Powell, M. W. Newton,

Louis Eisenlohr, the Alaska Dredging Company and the Alaska Mines Corporation, for the full amount of its judgment hereinbefore referred to, including interest, costs and disbursements, and that the Court decree the said judgment to be a first lien against the said assets, real and personal, in the possession and control of defendant Alaska Mines Corporation, and order and decree further that unless the same be paid that an execution may issue against said last-named defendants for the amount of said judgment, with costs and interest.

Fifth: That upon the final hearing of this cause if the Court finds that the defendant E. E. Powell was the vice-president [13] and general manager of the defendant, Nome Consolidated Dredging Company, and that defendant M. W. Newton was the president of said company, and that the defendants Louis Eisenlohr and E. L. Webster were directors and stockholders thereof, and that the Alaska Dredging Company was a stockholder of said Nome Consolidated Dredging Company, and that all of said parties conspired together, by and through the said acts of the said E. E. Powell to fraudulently gain control and possession of the assets, real and personal, belonging to the defendant Nome Consolidated Dredging Company, or preferred themselves as creditors as against this plaintiff, by and through the said foreclosure proceedings above alleged, then plaintiff prays the Court to grant it a personal judgment against said defendants last above mentioned, for the full amount of this judgment hereinbefore set forth, with interest, costs and accruing costs and that



it have execution against said parties for the recovery thereof.

Sixth: That upon the final hearing of this cause the Court grant to the plaintiff such other and further equitable relief as shall seem to the Court meet and proper.

Seventh: That the plaintiff herein do recover of and from the defendants, and each of them, its costs and disbursements herein expended.

WILLIAM A. GILMORE and  
T. M. REED,

Attorneys for Plaintiff. [14]

United States of America,  
Territory of Alaska,  
Second Division,—ss.

William A. Gilmore, being duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes; that he makes this verification for and on behalf of the plaintiff corporation for the reason that said corporation has no officer or agent in the Territory of Alaska authorized to verify said complaint.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 10th day of July, 1917.

[Seal]

D. B. CHACE,  
Notary Public for the Territory of Alaska, Residing  
at Nome.

(My commission expires May 12th, 1921.)

**Exhibit "A"—Decree of Foreclosure and Order of Sale.**

*In the District Court for the Territory of Alaska,  
Second Division.*

F. H. THATCHER, Trustee, E. E. POWELL,  
GEO. D. SCHOFIELD, E. L. WEBSTER,  
J. M. SLOAN and E. E. POWELL, Trustee,  
Plaintiffs,

vs.

NOME CONSOLIDATED DREDGING COM-  
PANY, a Corporation, and C. E. DARLING,  
Trustee,

Defendants.

This cause came on regularly to be heard in open court [15] on this 1st day of July, 1915, upon issue joined between the plaintiffs and the defendants, Ira D. Orton appearing for plaintiffs, O. D. Cochran appearing for the defendant C. E. Darling, trustee, and James Frawley appearing for the defendant Nome Consolidated Dredging Company, and said cause was submitted to the Court upon oral and documentary evidence adduced in open court, and the argument of counsel thereon, and the Court having duly considered the evidence adduced and the argument of counsel thereon, and being fully advised in the premises, thereupon made and filed its findings of fact herein, that all of the allegations set out in the complaint of plaintiffs were true and correct and that all of the allegations set out in the cross-bill in equity of C. E. Darling, trustee, were

true and correct, and from said findings the Court deduced as conclusions of law that plaintiffs were entitled to a judgment and a decree of foreclosure and order of sale of the mortgaged property as prayed for in their complaint, and that the said C. E. Darling, trustee, was entitled to a judgment and a decree of foreclosure and order of sale as prayed for in his cross-bill in equity on file herein, except that said judgment, decree of foreclosure and order of sale of mortgaged property granted to the said C. E. Darling, trustee, was and is declared to be junior, inferior and secondary to the judgment and decree of foreclosure and order of sale of the plaintiffs herein.

And now on this day said cause came on further to be heard in open court upon the motion of Ira D. Orton, attorney for plaintiffs, joined in by O. D. Cochran, attorney for the defendant C. E. Darling, trustee, moving the Court now here to enter judgment and decree of foreclosure and order of sale of the mortgaged property in accordance with the findings of fact and conclusions of law heretofore made and entered herein, and the Court having duly considered said findings of fact and conclusions of law and now being fully advised in the premises [16] hereby sustains said motion.

AND NOW, in consideration of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed that the said plaintiff F. H. Thatcher, trustee, and his co-plaintiffs herein named do have and recover of and from the said defendant Nome Consolidated Dredging Company, a corporation, the



sum of Twenty-six Thousand Four Hundred Twenty and 56/100 Dollars (\$26,420.56), together with a trustee fee of \$250, and an attorney's fee of \$100 and the costs of this suit, taxed at \$29.10, which said sums and this judgment is hereby declared to be a first and paramount valid lien upon all of the mortgaged real and personal property hereinafter described.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant C. E. Darling, trustee, under his cross-bill in equity filed herein, do have and recover of and from the said defendant Nome Consolidated Dredging Company, a corporation, the sum of Two Hundred Nine Thousand Four Hundred Seventy-one and 60/100 Dollars (\$209,471.60), together with a trustee's fee of \$250.00 and an attorney fee of \$100.00, and his costs herein expended, taxed at \$1.00, which said sums and this judgment is hereby declared to be a junior, inferior and secondary valid lien upon all of the mortgaged real and personal property hereinafter described, but subject to the first and paramount lien of the judgment of the plaintiffs herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all and singular the mortgaged real and personal property mentioned in the complaint on file herein and in said cross-bill in equity, and hereinafter described, or so much thereof as may be sufficient to raise the amount found due to plaintiffs for principal, interest, trustees' fees, attorneys' fees, costs of suit and expenses of sale, be sold at public auction by the [17] United States mar-

shal for said district, in the manner prescribed by law and according to the course and practice of this court, and the same applied to the payment of the judgment of plaintiffs, and the excess, if any, applied to the payment of the judgment of the said C. E. Darling, trustee.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States marshal out of the proceeds of said sale, will retain his disbursements and commissions on said sale or sales and pay into the registry of this court out of the proceeds of said sale or sales the remainder of the money realized on said sale or sales, to be paid upon the judgments herein referred to in accordance with their priority as herein fixed; provided, the purchaser or purchasers at such sale or sales pay, in lieu of cash, pay therefor wholly or partly in the notes secured by said respective mortgages, in accordance with their priority as herein designated and determined, and which said notes the said United States marshal on any sale or sales made hereunder shall receive at the amount to which the holder or holders thereof would have been entitled on a distribution of the purchase price, had the same been paid wholly in cash, provided, further, that the notes represented by the judgment of plaintiffs shall be and remain first and paramount obligations to be liquidated and paid in full to the extent of the judgment of plaintiffs with interest, trustees' fees, attorneys' fees and costs of suit and sale, prior to any participation in said fund by the note holders and owners represented by the judgment of the said C. E. Darling, trustee;

the bidding power in lieu of cash vested in said plaintiffs as a first and paramount lien, being as follows:

E. E. Powell, Trustee, under notes numbered 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 33, 34, 35 and 37.....\$20,967.72

E. E. Powell (individually [18] and not as Trustee) under notes numbered 8 and 32.....\$ 1,095.34

E. L. Webster under notes numbered 15, 16, 24 and 25.....\$ 2,190.67

Geo. D. Schofield under notes numbered 29, 30 and 31.....\$ 1,643.00

J. M. Sloan under note numbered 36.....\$ 523.83

together with costs and expenses aforesaid; and which said several sums with costs aforesaid shall be received by said United States marshal in lieu of cash on any such sale or sales, without preference, priority, or distinction of one sum over the other, but *pro rata* under any and all bids on such sale or sales made by plaintiffs individually or through their said trustee or trustees.

That the bidding power in lieu of cash vested in said C. E. Darling, trustee, after the payment of the amount found due unto plaintiffs, or their receipt for such amount which shall be equivalent to cash, under the judgment rendered on the cross-bill in equity herein, and as a junior, inferior and secondary valid lien, is as follows:



Under notes numbered 1, 34, 64 and 65, endorsed in blank by L. H. Eisenlohr,  
the sum of.....\$22,522.65

Under notes numbered 35, 36, 37, 38, 39,  
40, 49, 50, 58, 59, 60, 61, 62 and 63,  
endorsed in blank by M. W. Newton  
is the sum of.....\$57,603.32

Under notes numbered 2, 3, 4, 5, 6, 7, 8, 9,  
10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20,  
21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31,  
32, 33, 41, 42, 43, 44, 45, 46, 47, 48, 51,  
52, 53, 54, 55, 56, 57, 66, 67, 68, 69 and  
70, endorsed in blank by the Alaska  
Dredging Company in the sum of..\$129,345.63

And which said sums as a bidding power, shall be subject to all of the terms and conditions granted to the sums due unto plaintiffs heretofore mentioned, except the same shall be secondary in said bidding and can only be used after the [19] extinguishment of plaintiffs' said judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purchaser at such sale or sales be put into possession of the purchased property, and that any person or persons who, since the execution and recording of said Thatcher mortgage or said Sloan mortgage, as the case may be, has come into possession of said mortgaged real or personal property, or any part thereof, shall deliver possession of the same to the purchaser or purchasers on production of the United States marshal's certificate of sale therefor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the moneys arising from said sale or sales, or the moneys due hereunder used in bidding upon said sale or sales in lieu of cash as provided in this decree, shall be insufficient to pay first, the amounts found due to the plaintiffs as herein stated, and second, the amounts herein found due to C. E. Darling, trustee, aforesaid, as herein stated, then the United States marshal shall specify the amount of deficiency and balance due to the plaintiffs or the said C. E. Darling, trustee, as the case may be, in his return of said sale or sales, and that on the coming in and filing of said return the clerk of this court shall docket a judgment for said balance against the said defendant Nome Consolidated Dredging Company, and in favor of the party entitled thereto under this decree, and that said defendant Nome Consolidated Dredging Company pay said deficiency judgment with interest thereon at the rate of eight per cent per annum (8%) from the date of said last-mentioned return and judgment, and that the party entitled thereto have special execution under this decree, and upon the docketing of said deficiency judgment, have execution for said deficiency; that the judgments herein mentioned shall bear interest at the rate of eight per cent (8%) per annum from the date of entry. [20]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the said defendant Nome Consolidated Dredging Company, a corporation, and all persons claiming or to claim by, through or under it, and all persons having liens subsequent to

said mortgages by judgment or decree upon the land described in said mortgages, and its successors or assigns, and all persons having any lien or claim by or under such subsequent judgment or decree, or their heirs or personal representatives, and all persons claiming to have acquired any estate or interest in and to said premises or any part thereof subsequent to the recording of said mortgages aforesaid, be forever barred and foreclosed of and from all equity or redemption and claim of, in, and to said mortgaged real and personal property and every part and parcel thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the United States marshal in making any sale or sales hereunder, shall first make a sale of the personal property described in this decree, and in case the sum realized from the sale thereof is insufficient to pay the said several amounts found due hereunder, said United States marshal shall then proceed with a sale of the real property herein described, as required by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that special writ of execution be and the same is hereby awarded, and that the United States marshal upon receipt of a special writ of execution with a certified copy of this decree annexed thereto, shall execute this decree and order of sale as herein provided, and make due return thereto, as required by law.

The real and personal property directed to be sold under this decree and order of foreclosure is particularly described as follows: [21]



## REAL PROPERTY.

Approximately one hundred and sixty-five acres of ground held and owned by the company on a part of which stands No. 3 dredge; said property is known as the "Carnation Group," situated on Wonder Creek; the Bonanza Association claim situated at the east side of the city of Nome townsite; the Anderson claim situated on the west side of the Bonanza claim, and a one-half interest in No. 4 Bench left limit of No. 4 Below on Dry Creek.

Also five hundred and forty-two acres, against which is still owing approximately twenty-six thousand dollars falling due this year and next, known as the Bell claim, a Bench off the right limit of No. 2 Flat Creek, No. 1 Above on Wonder Creek, four claims, Jewel, Gold Dust, Lucky two, No. 2 Claim and Juanita, situated off the left limit of No. 13 Below on Dry Creek, Moonlight Claim, situated second tier of Benches off No. 10 Below on Dry Creek, Combination Claim situated off of No. 4 and 5 Below right limit Dry Creek. Johnson group, one-half interest in three claims situated on the left limit of No. 2 Above on Dry Creek, and described as Tibbets, Convex and Concave claims, Big 5 claim, situated second tier benches off No. 11 and 12 Below on Dry Creek. The Milton and Dover Association claims at the mouth of Little *Little* Creek, No. 5 Peluck and No. 2 Tundra, North of the Milk Ranch east end of Nome. Sheldon, No. 2 off No. 2 Below on Wonder, L. L. Also approximately 521 acres held under twenty year lease and option from the Anvil Hydraulic and Drainage Company, owners, operated

under lease with contract providing that deed shall pass to operating company when royalty equals purchase price. This is a nearly contiguous piece of property lying along the two beds of Bourbon Creek, East Bourbon Creek, Holyoke Creek, Saturday Creek and Lake Creek, as shown by one [22] certain contract and lease recorded in Nome Recording District, District of Alaska, reference to which is hereby made.

Also 52 $\frac{1}{2}$  acres held under lease and option for 20 years, property owned by the Alaska Dredging Company, providing also that when royalties equal purchase price deeds pass to the operating company. This property is situated on Wonder Creek and is a contiguous piece of property.

#### REAL AND PERSONAL PROPERTY.

Also 1 seven cubic feet open connected bucket, Bucyrus type, Dredge, built in 1909; now operating on the Chestnut Tundra Placer claim on Wonder Creek, also all the cables, and other appurtenances.

Also 1 seven cubic feet connecting bucket, Bucyrus type, Dredge, built in 1907 and 1909, rebuilt in 1912; now operating on No. 4 Below Discovery on Bourbon Creek; also all the cables and other appurtenances.

Also 1 ten cubic feet close connected bucket, Bucyrus type, Dredge, in course of construction, on No. 2 Below on Wonder Creek.

Also 1 Power Plant, Westinghouse equipment, for generating 650 K. W. Turbine driven, Babcock-Wilcox Boilers, 3 units 150 H. P. each; Auxiliary equipment complete, all on concrete building 70'x70'

overhead traveling crane; modern throughout; built in 1907; situated on No. 5 Below on Bourbon Creek.

Also 1 five thousand barrel steel tank at Power house, with  $\frac{3}{4}$  mile of 4" pipe-line from storage tank at Nome to said tank and  $2\frac{1}{2}$  miles of 2" pipe-line from said steel tank, running through the property to tanks used for storage for thawing operations, on No. 2 Saturday Creek.

Also one-half mile of narrow gauge railroad running [23] from the Seward Peninsula Railroad to the Power Plant.

Also two wood frame, corrugated iron warehouses, about 30x40 ft. situate on No. 5 Below on Bourbon Creek.

Also one wood construction repair shop about 20x40 feet, excepting tools therein, which is owned by Powell Bros.

Also one wood construction warehouse and shop about 20x20 feet, also situated on No. 5 Below on Bourbon Creek.

Also two wood construction mess-houses about 18x30 feet, with storehouse attached, one situated on No. 6 Below on Bourbon Creek and one on No. 2 Saturday Creek and fixtures therein.

Also five wood construction bunk-houses, also miscellaneous cabins, etc., situate on No. 5 and 6 Below on Bourbon and No. 2 Saturday Creek, and No. 1 Wonder Creek.

Also two wood construction residence buildings for superintendents in the city of Nome, and the lots on which the same are situated, described as lot 40,



block 30, and lots 10 and 11, block 91, also the furniture and fixtures therein.

Also one wood construction office building in the city of Nome, and the lots on which the same is situated, known as lots 28, 29 and 30 in block 16, of the town of Nome.

Also six miles of ditches leading from headwaters of Dry Creek to the southern limits of the property, adjoining the city of Nome.

Also miscellaneous supplies used in connection with dredging operations, spare parts, heating and thawing plants, approximate utilizable value \$35,000, situated in warehouses and piles at said power plant on Discovery Wonder and on Nos. 4, 5 and 6 Below on Bourbon Creek.

Also one combination shear and punch, situate on No. 2 Holyoke Creek. [24]

Also two 100 H. P. Boilers situate on No. 1 Bench off of No. 13 Below on Dry Creek L. L. near the junction of Steadman Avenue and Dry Creek.

Also two automobiles used in connection with the operations of the company.

Also all assaying and refining supplies, tools and utensils of all kinds and character now owned by the company.

Also three Keystone Drills in use on the company's property, one of which now sets on top of Snyder's Hill, head of Rocker Creek, and all equipment.

Also 1 oil tank situate on No. 2 Saturday Creek and pipe-line leading therefrom to Discovery Wonder.

Also all engines, boilers and piping situated in company's warehouses and on the property, together with all mining appliances and other personal property of every name, nature and description, situate in Cape Nome Precinct, Alaska. All situate and being in Cape Nome Precinct, Alaska.

Done in open court, this 1st day of July, 1915.

J. R. TUCKER,  
District Judge.

**Exhibit "B"—Marshal's Return to Writ of Execution.**

United States of America,  
District of Alaska,  
Second Division,—ss.

I hereby certify that I received the hereto attached special writ of execution on the 2d day of July, 1915, and thereafter on the same day I executed the same by taking into my possession the personal property mentioned and described in the annexed writ of execution and notice of marshal's sale. And thereafter on the same day I did advertise, according to law, the sale of the personal property as mentioned and described in the [25] attached special writ of execution and notice of marshal's sale, by posting written notices of the time and place of sale, a copy of which is hereto attached and made a part hereof, said notices being posted in three public places within five miles of the place of sale, one of said notices being posted at the front door of the postoffice at Nome, Alaska, and thereafter on the 3d day of July, 1915, I did adver-

tise according to law the sale of all the right, title, and interest of the defendants in the action herein, in and to those certain placer mining claims, all lying and being situated in the Cape Nome Recording Precinct, District of Alaska, Second Division, as mentioned and described in the annexed special writ of execution and notice of marshal's sale, by posting a printed notice of the time and place of sale in three public places within five miles of the place of sale, one of said notices being posted at the front door of the postoffice at Nome, Alaska, and by causing to be published once a week for the same period, on five consecutive week intervening days, in the "Nome Daily Nugget," a newspaper of general circulation nearest the place of sale, a like notice, a copy of which with affidavit of publication is hereto attached and made a part hereof. And thereafter on the 12th day of July, 1915, at 10 o'clock A. M. I offered for sale at public vendue the following described personal property:

All the furniture and fixtures located in the lower part of the building which was and is situated on lots 28, 29 and 30, block No. 16 of the town of Nome.

and sold the same to the plaintiff, E. E. Powell, for the sum of five (\$5.00) dollars, that being the highest and best bid received for the same. And thereafter on the same day, at the places and times at which said sales were advertised to take place, according to the notice of sale of personal property hereto attached, for good and sufficient reasons, I postponed all [26] other sales of personal prop-



erty mentioned in said notice of sale, of personal property, for a period of forty-eight hours; and thereafter on the 14th day of July, 1915, at the exact times and places last above indicated, being at the places, and at the times which were forty-eight hours later than those times, set out, and indicated in said notice of sale of personal property, I offered for sale at public vendue, first in separate parcels and then as hereinafter indicated, and sold the same to the plaintiff, E. E. Powell, all of said personal property in parcels and quantities as hereinafter indicated and for the prices set opposite the description of each parcel or quantity of personal property; he being the highest and best bidder at said sales, and the amounts set opposite the description of each parcel of personal property being the highest and best sums bid at said sales to wit:

All of the office furniture located in the	
upper part of the building was and is	
located on lots 28, 29, 30, in block No.	
16 of the town of Nome.....	\$ 200.00
But not including the personal furniture in	
the 3 east rooms.	
All the furniture and fixtures located in the	
house which was and is situated on lot	
No. 40, block No. 30, in the town of	
Nome .....	20.00
All of the furniture and fixtures located	
in the house which was and is situated	
on lots #10 and #11, block #91, in	
the town of Nome.....	10.00

One power plant—Westinghouse equipment for generating 650 K. W. Turbine Driven Babcock-Wilcox boilers, 3 units, 150 H. P. each, Auxiliary equipment, complete.....	10,000.00
One 5,000 barrel steel tank with $\frac{3}{4}$ mile of 4" pipe and $2\frac{1}{2}$ miles 2" pipe.....	100.00
One-half mile narrow gauge railroad.....	20.00

**[27]**

Two wood frame, corrugated iron warehouses; one wood construction warehouse; one wood construction warehouse and shop, and one wood construction warehouse and repair house	50.00
One wood construction mess-house; three wood construction bunk-houses.....	10.00
Miscellaneous supplies used in connection with dredging; spare parts, heating and thawing plants.....	100.00
One automobile .....	100.00
All assaying and refining supplies, tools, and utensils .....	5.00
1 Keystone drill .....	10.00
1 seven cubic feet connected bucket Bucyrus type dredge; also all cables and appurtenances thereunto belonging .....	3,000.00
1 electric transmission line from power plant on Bourbon Creek to dredge on same, and 1 electric transmission line from power plant on Bourbon Creek to dredge on Wonder Creek.....	50.00

1 seven cubic feet open connected bucket, Bucyrus type dredge; all cables and appurtenances thereunto belonging..	5,000.00
1 mess-house and furniture and fixtures therein, 2 cabins .....	50.00
2 Keystone drills.....	100.00
1 unfinished dredge .....	1,000.00
2 100 H. P. boilers.....	45.00
1 thawing plant.....	50.00
1 oil tank .....	25.00
Supplies, materials and repair parts near Wonder Creek Dredge.....	50.00

That thereafter on the 2d day of August, 1915, in further execution of said special writ of execution, at the time and place set out and described in the printed notice of marshal's sale hereto attached and made a part hereof, I offered the real property therein described, for sale at public vendue, in separate parcels and received no bids therefor, and immediately thereafter [28] I offered all of said real property for sale in one parcel and sold the same to the plaintiff, E. E. Powell, for the sum of Three Thousand (\$3,000.00) Dollars, the said E. E. Powell being the highest and best bidder at said sale, and the above sum being the highest and best sum bid at said sale for said real property. That the said E. E. Powell, at the time of said sales, appearing to be the owner and possessor of all of the hereinafter referred to notes, tendered to me all of the notes mentioned and referred to on page four (4) of the "Decree of Foreclosure and Order of Sale" included in the hereto attached special writ of exe-



cution and requested that the total amount bid for said above-described personal property and said real property be credited and applied upon said notes, ratably, and according to the terms of said decree, and I have followed said request, causing each note to be credited with its proportionate part of the total amount bid for said personal and said real property, and I have returned all of said notes to the clerk of the court issuing said writ.

E. E. Powell, the plaintiff, has paid to me as costs, attorneys fees and trustee's fees, the sum of \$382.60, in cash, which said sum has been paid into the registry of said court by me.

Returned this 3d day of August, 1915.

E. R. JORDAN,  
United States Marshal, Second Division, District of  
Alaska.

By A. B. Miller,  
Chief Deputy.

#### MARSHAL'S COSTS.

1 Service .....	6.00
3½% Commission on \$500.....	17.50
2% Commission on \$10,000.....	200.00
1¼% Commission on \$12,500.....	156.25
20 miles @ 20¢ mile.....	4.00
Advertising .....	59.00

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\$442.75

**Exhibit "C"—Annual Statement.**

In compliance with the provisions of Chapter 23, Part V, Title III, of the Civil Code of the District of Alaska, pertaining to corporations:

1. The name of this company is NOME CONSOLIDATED DREDGING CO., organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, King County, Washington, and its principal office within the District of Alaska, at Nome, therein;

2. The amount of the capital stock of said corporation is 10,000,000 dollars and the same is divided into 10,000,000 shares of the par value of \$1.00 each;

3. Three shares of said capital stock has been paid for in cash.

4. 9,999,997 shares of said capital stock have been paid for in placer gold mining locations, contracts, purchasing agreements, mining machinery and leases and other property conveyed and delivered to said corporation.

5. The actual cash value of the assets of said corporation, as shown by the books of accounts thereof, on June 30th, 1915, is 670,906.31 dollars and consists of:

Mining claims .....	\$107,621.19
Dredges in operation.....	337,059.48
Dredge under construction....	122,434.58
Power plant and railroad.....	76,558.58
Automobiles .....	1,733.26

Machine-shop building.....	112.50
Accounts receivable .....	754.40
Assay plant, furniture and fixtures and miscellaneous assets .....	24,632.22

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\$670,906.31

6. The liabilities of said corporation, as shown by the books of account thereof, on June 30th, 1915, are:

Accounts payable .....	\$266,095.04
Bills payable .....	120,452.55

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\$386,547.59

IN WITNESS WHEREOF the vice-president and assistant secretary of the Nome Consolidated Dredging Company have executed the foregoing instrument and affixed the corporate seal hereto, this 3d day of ———, 1915.

NOME CONSOLIDATED DREDGING  
COMPANY.

[Seal]

By E. E. POWELL,  
Vice-president.

By F. S. POWELL,  
Assistant Secretary.

Majority of Trustees.

Attest:

E. E. POWELL.

F. S. POWELL, [30]



State of Washington,  
County of King,—ss.

E. E. Powell and F. S. Powell, being first duly sworn, depose and say: That they are the vice-president and assistant secretary, respectively, of the Nome Consolidated Dredging Company, a corporation, organized and existing under the laws of the State of Washington, doing business in the District of Alaska; that they have read the foregoing statement of the affairs of said corporation, compiled from the books of account thereof on the 30th day of June, A. D. 1915; that the same is true and correct as they verily believe, and that the seal affixed thereto is the corporate seal of said corporation.

Subscribed and sworn to before me this 8th day of Oct., 1915.

[Seal]

W. W. DEARBORN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

10¢ rev. stamp can. 10/25/1915.

Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 10, 1917.  
G. A. Adams, Clerk.

And on the same day an affidavit was filed by plaintiff in words and figures as follows:

**Affidavit of William A. Gilmore.**

[Title of Court and Cause.]

United States of America,

Territory of Alaska,

Second Division,—ss.

William A. Gilmore, being duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff herein; that he makes this affidavit for and on behalf of the plaintiff because there are no officers or agents of said plaintiff corporation now within the jurisdiction of this court.

That affiant is a practicing attorney, admitted to [31] practice in the above-entitled court and has been practicing at Nome, Alaska, for many years last past, and has been, and is, personally familiar with many of the transactions mentioned and set forth in plaintiff's complaint.

That affiant has examined the records and files in the foreclosure proceedings set forth in plaintiff's complaint and the dates and facts therein given are from the records of said actions in the above-entitled court.

That affiant was personally present at the said sales and knows that one Jafet Lindeberg, a wealthy resident of Nome, Alaska, was present at said sales intending to bid thereat, but was prevented from bidding on the sale of said assets by reason of the use by the said defendant E. E. Powell of the said spurious notes referred to in plaintiff's complaint; that affiant is personally acquainted with defendant E. E.

Powell, and on one occasion in Nome, Alaska, heard the said Powell admit that he had the said decree mentioned in plaintiff's complaint prepared by his attorneys and under the advice of his attorneys, so that he could use the said notes to prevent *bona fide* bidders from bidding at the said sale; that affiant also, on said occasion, heard the said Powell admit and say that he was acting for the said defendants M. W. Newton, Louis Eisenlohr, the Alaska Dredging Company and himself and others whom he refused to name, and that he took the title at said sales as trustee for said persons; that affiant also heard the said Powell admit that it was his intention to organize a company and that he intended to organize a company with the said defendants last above named, and that he intended to transfer the title of the said assets so acquired by him at said sales to the said company to be so organized, and that the stock of said corporation when so organized should be apportioned and divided among the said defendants so participating in the said [32] organization; that affiant also knows that the defendant Alaska Mines Corporation is now in the possession and in the control and use of the said assets mentioned in plaintiff's complaint.

That affiant also heard the said Powell on said occasion admit that the mortgages mentioned and set forth in plaintiff's complaint were made for the purpose of protecting the parties therein named and that the said Powell also admitted that said notes were delivered to him and held by him as trustee for said persons.



That affiant, as one of the attorneys for plaintiff in cause No. 2686, secured a judgment at law for the plaintiff in the above-entitled court and subsequently caused an execution to be taken out therein and placed in the hands of the United States marshal for the Second Division of the Territory of Alaska, which said execution was returned by the marshal to the clerk of the above-entitled court recently with the marshal's return showing that no property could be found by him belonging to said judgment debtor; that the said judgment still remains wholly unpaid and unsatisfied and is a *bona fide*, existing judgment due the plaintiff by the said defendant Nome Consolidated Dredging Company.

That unless the Court appoint a receiver to take possession and control of the assets in dispute herein, the same will be dissipated, squandered and rendered of no value.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 10th day of July, 1917.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

(My commission expires May 12th, 1921.)

Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Alaska. Jul. 10, 1917. G. A. Adams, Clerk. [33]

And on the same day at the same time a motion was filed by the plaintiff in words and figures as follows:

**Motion for Appointment of Receiver of Nome  
Consolidated Dredging Co.**

[Title of Court and Cause.]

Comes now the plaintiff and moves the Court for an order compelling and requiring the defendants to show cause, if any they have, why a receiver should not be appointed to take possession of all of the assets, real and personal, belonging to the defendant Nome Consolidated Dredging Company, mentioned, set forth and described in Exhibit "A" of plaintiff's complaint herein; and the plaintiff further moves the Court to appoint a receiver to take possession and control of all of said assets, real and personal, mentioned and described in Exhibit "A" to plaintiff's complaint, *pendente lite*, or until the further order of the Court.

This motion is made and based upon the complaint filed herein, the affidavit of William A. Gilmore, upon all the records and files of this cause, and upon all the records and files of the said action mentioned and described in plaintiff's complaint as cause No. 2608 and known as the case of F. H. Thatcher, Trustee, versus Nome Consolidated Dredging Company, a Corporation, and upon all the records, files and proceedings in any and all other actions pertaining to titles, possession and control of said assets mentioned and set forth in the complaint, and upon the records and proceedings in said cause No. 2686 entitled the American Manganese Steel Company, a Corporation, versus Nome Consolidated Dredging Company.

Dated at Nome, Alaska, this 10th day of July, 1917.

WILLIAM A. GILMORE,

T. M. REED,

Attorneys for Plaintiff. [34]

Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Alaska. Jul. 10, 1917. G. A. Adams, Clerk.

On consideration of said complaint, affidavit and motion, the Court made and entered its order to show cause as follows:

**Order to Show Cause.**

(Title of Court and Cause.)

This matter coming on before the court *ex parte* on the motion of the plaintiff for an order requiring the defendants to show cause, if any they have, why a receiver should not be appointed to take possession of the assets, real and personal, mentioned and described in the complaint, and the Court being otherwise fully advised in the premises, now

ORDERS AND DIRECTS that you, the Alaska Mines Corporation, a corporation, Nome Consolidated Dredging Company, a corporation, Alaska Dredging Company, a corporation, E. E. Powell, George D. Schofield, J. M. Sloan, E. L. Webster, M. W. Newton, Louis Eisenlohr, F. H. Thatcher, trustee, C. E. Darling, trustee, and E. E. Powell, trustee, and each of you show cause, if any you have, at the courtroom of the above-entitled court in Nome, Alaska, on Tuesday, the 17th day of July, 1917, at the hour of 11 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, why a



receiver should not be appointed to take possession of all of the assets, real and personal, mentioned, described and set forth in plaintiff's complaint and as prayed for in said complaint and its motion made and filed herein.

Done in chambers this 10th day of July, 1917.

J. R. TUCKER,  
District Judge.

United States of America,  
Territory of Alaska,

Second Division,—ss. [35]

I hereby certify that I received a certified copy of the annexed Order to Show Cause at Nome, Alaska, on the 10th day of July, 1917, and thereafter on the same day I served the same upon the Alaska Mines Corporation by handing to and leaving with H. S. Thompson, assistant treasurer of said corporation, the said certified copy.

Returned this 28th day of July, 1917.

E. R. JORDAN,  
United States Marshal.  
By L. D. Lewis,  
Deputy.

**MARSHAL'S COSTS.**

1 service .....\$6.00

Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome, Alaska.  
Jul. 10, 1917. G. A. Adams, Clerk.

BE IT FURTHER REMEMBERED that thereafter the defendant, Alaska Mines Corporation, appeared and upon its motion the hearing on Order to Show Cause was continued from time to time by

order of the Court until the 6th day of September, 1917.

BE IT FURTHER REMEMBERED that on the 1st day of September, 1917, on the motion of plaintiff the Court entered a written Order of Default against the defendants, Nome Consolidated Dredging Company, a corporation, and C. E. Darling, trustee, for failure to appear and answer.

AND BE IT FURTHER REMEMBERED that on the said 6th day of September, 1917, said Order to Show Cause having been duly served, filed and regularly continued, on said day came on to be heard before the Court. The plaintiff, being represented by Messrs. T. M. Reed and William A. Gilmore, its attorneys of record, and the defendant Alaska Mines Corporation being represented at said hearing by Messrs. O. D. Cochran, Ira D. Orton and F. D. Merritt, its attorneys of record in said cause.

The plaintiff, in support of the motion for an order appointing a receiver *pendente lite*, introduced and read in evidence the said complaint and affidavit hereinbefore set forth; and also introduced and read in evidence the original annual statement of the Nome Consolidated Dredging Company for the year [36] 1915, which was admitted in evidence and marked "Plaintiff's Exhibit 1," a copy of which exhibit is set out in full as "Exhibit 3" to plaintiff's complaint.

The plaintiff then introduced and read in evidence the deposition of E. E. Powell in the case of Geo. D. Schofield vs. E. E. Powell, No. 2630, in the District Court for the District of Alaska, Second Di-

vision, taken on the 25th day of August, 1915, before D. B. Chace, a notary public, and one of the defendants named in the above-entitled action, which said deposition was received in evidence and marked "Plaintiff's Exhibit 2," being in substance in words and figures as follows, to wit:

**Plaintiff's Exhibit No. 2—Portion of Deposition of  
E. E. Powell.**

Direct Examination by Mr. GILMORE.

I am the defendant in the case of Geo. D. Schofield vs. E. E. Powell. I brought with me all the documents and papers that I had, mentioned in the subpoena.

I know of a certain agreement that I signed with certain parties, Mr. Schofield, Mr. Eisenlohr, Mr. Newton, Mr. Bremer, and another gentleman, I cannot think of his name, in New York, also signed the paper. To the best of my knowledge it was signed along in October, 1914, to about January, 1915. It was also signed by Dr. Sloan. The original is in Seattle, I believe, in the possession of my brother, F. S. Powell. There were several copies made of it, but I did not keep a copy.

I have a copy of a letter that Mr. Schofield wrote which I hand to you (letter offered and received in evidence and marked Plaintiff's Exhibit "A" to the deposition), being as follows:



**Plaintiff's Exhibit "A" to Deposition of E. E. Powell—Statement of Readjustment of Organization of Nome Consolidated Dredging Company.**

**PLAINTIFF'S EX. "A."**

"Seattle, Wash., Nov. 20, 1914.

To Eastern Co-owners of Notes Secured by Mortgage of Nome Consolidated Dredging Co.

Gentlemen:—

Readjustment of Organization of Nome Consolidated Dredging Co.

During the past five years I have been general counsel of Nome Consolidated Dredging Company, and allied corporations, at Nome, Alaska. This association has brought me in close touch with the management of the company, and has made me particularly familiar with the inner workings of the company, as well as with the value of its holdings, including power plant, dredges, mining ground, and the general operations of the company.

During my connection with the company, I have from season to season assisted in a financial way in caring [37] for pressing obligations that should have been provided for by eastern stockholders at the commencement of the dredging season. At the close of the season this year, I again assisted the management by a personal loan of money to care for obligations that had to be met to avoid litigation, with its attendant expense and financial loss, if not actual bankruptcy. In fact the company at this time is indebted to me for moneys advanced to pay

company indebtedness in an amount exceeding \$3,000.00. About one-half of this amount now stands secured under the \$25,000.00 mortgage, F. H. Thatcher, trustee, while the remaining amount stands unsecured, altho actually paid out by me in cashing time checks of the company issued to laborers upon your dredges. These time checks I still hold. I have not done this on philanthropic ground for the benefit of eastern stockholders who seem to take so little interest in their own investments, but because I desired to see the N. C. D. Co. remain a 'going concern.' With a little additional financing, there is not a concern in Alaska to-day that has the opportunity of 'making good' in a large way, that lies before this company. It absolutely controls the gold mining situation on Seward Peninsula to-day. Its holdings (mining ground) are so located that it controls the vast area of proved valuable dredging ground in the basin back of Nome thru to the foothills; a basin the like of which for proved values that can be mined at a profit, is not known to exist in Alaska, or elsewhere. This basin controlled by the company is capable of supporting a Ten Million Dollar Corporation, and paying good returns on the investment for at least fifty years to come.

The original plan of operations was correctly laid, viz: A central electric power plant, with sufficient power to operate a number of dredges, working on the unit basis; each dredge counting as a unit in the organization.

The result of this organization is to reduce all operating expenses and overhead charges upon the

installing of each additional dredge.

The company now has two dredges in operation with a third dredge in course of construction. This third dredge should be completed at once, thereby adding the third unit to your organization; doubling your output and at the same time reducing, proportionately, your operating expenses.

From your reports of past years I find that it cost you \$7,800.00 per month to operate ONE dredge; \$8,000.00 per month (now) to operate TWO dredges. The cost of operating the third dredge would be approximately \$3,000.00 per month additional; say approximately \$12,000.00 per month for operating THREE dredges as against \$7,800.00 for operating one. With the two dredges running, your output is approximately \$20,000.00 per month at a cost of approximately \$8,000. With your third dredge completed (your largest plant) your output would be approximately \$50,000.00 per month at a cost of \$12,000.00. It would seem from a business viewpoint, that comment is unnecessary. [38]

Your present mode of operation is unbusinesslike and expensive in the extreme. It lacks efficiency in financial preparation. The trouble is that you have attempted to purchase, equip, maintain and operate one of the largest and most valuable propositions known to dredge-mining on too small an amount of working capital. Ever since my connection with the company you have attempted to make the concern 'dig' its own way out, and at the same time expect it to acquire additional equipment, construct new dredges, acquire additional ground and maintain

a standard of efficiency of the dredges already working; this, too, without any additional working capital. Your theory would be all right had you sufficiently financed the enterprise in the first instance to have completed the three dredges and placed upon the ground the necessary additional equipment to maintain the dredges at a working efficiency at all times during dredging season.

This you did not do, and you ought not expect something for nothing. The present situation may be likened to an attempt to speculate upon a shoe-string or to become a King of Finance upon a dollar investment.

The whole situation may be summed up in four words, viz.: 'LACK OF WORKING CAPITAL.'

For instance: This year's output was curtailed by at least \$50,000.00 for the want of a Tumbler on the Wonder Dredge and a Motor on Bourbon Dredge; extra parts that every live concern should carry. These extras would not have cost to exceed \$1,500.00. Yet you lost nearly the entire season for want of them. In fact, to my own personal knowledge, the Tumbler on the Wonder Dredge has been cracked for the past three years, and during all that time liable to give away at any time. Moreover, I know that your manager, Mr. E. E. Powell, has time and time again called attention to this condition, and requested that these extra parts be on hand for emergency.

Again. The Nome bank-rate of interest is one per cent per month. Merchants are compelled to pay that rate. I know the company has paid out



thousands of dollars on interest charge at this high rate. This interest has been paid to the bank, to merchants and to laborers on past due time checks. No concern can pay this rate of interest and survive for any great length of time.

It occurs to me that while the eastern stockholders and bondholders of the company are industriously looking for eastern investments that will yield them 5% interest annually they are overlooking the fact that they own and control the largest and most valuable dredge-mining proposition in the world upon which they are paying 12% annual interest on large amounts for current expenses, and which valuable holdings is actually slowly starving to death for the want of a little financial assistance,—assistance, too, that would put the company upon its feet and IMMEDIATELY make the concern a large dividend payer.

Again: Inability to promptly pay off labor, merchants and current accounts has destroyed your local credit. You buy on time and pay the extra toll. Your [39] manager is unable at times to discharge an employee for want of funds. Result: Your labor is inefficient and your workmen 'soldier' on you.

In fine, 'FOR LACK OF WORKING CAPITAL' I consider you are paying from 15% to 20% above the market price for all labor employed or material purchased.

In my judgment, the most remarkable thing of the whole thing is, that your manager has been able to hold the concern together at all, at Nome. Considering the value of your mining ground, its extent

and location, the value of your power plant and three dredges as compared to the limited amount of capital invested, I consider the showing made one of the most remarkable in Alaska mining history.

There is only one thing to do to put this concern upon its feet and make it a live dividend-paying proposition, and that is to complete dredge No. 31, furnish a few extra working parts for use in case of emergency; pay off your debts, provide a small working capital to be used on emergency occasions, and then go ahead. If you will adopt this recommendation and CARRY IT INTO EFFECT NEXT SEASON, I have no hesitancy in saying that I consider you have the best paying proposition in Alaska to-day. I have arrived at this conclusion by virtue of my close connection with the company's affairs backed by fourteen years of actual continuous winter and summer experience in all classes of mining at Nome. I consider the holdings of the N. C. D. Company, and allied corporations, far more valuable than those of the Pioneer Mining Company, with its miles of ditches and acres of mining ground, and fifteen years of successful mining behind it, and many profitable years of mining ahead of it.

However, to bring your company to the front as a dividend producer, you **MUST** change your mode of operation as I have suggested above. Unless you do this, you can look for nothing but **FAILURE** and a total loss of your present investment.

If there are stockholders in your company who are financially able to assist in the suggested readjustment of the organization as above outlined, but who

refuse to do so, then my recommendation would be a foreclosure of the mortgage executed by the company and the elimination of the 'drones' in the hive, at the same time protecting those of the company and its creditors who are willing to GO ON with the proposition and take care of its financial burdens.

Those who STAY IN will, in my judgment, reap large returns for their fealty.

As one of the stockholders and bondholders of Wonder Dredging Company and a creditor of Nome Consolidated Dredging Company, I would be glad of an opportunity to participate in a readjustment of the company's affairs if undertaken along the lines I have suggested herein, or along other lines looking to the placing of the concern upon a cash basis. I know if this is done, SUCCESS is sure; if not, FAILURE and possible bankruptcy stares you in the face. [40]

Anything I can do by co-operation or by outlining a reorganization scheme or other effort that may tend to bring about the desired result along the lines herein laid down, advise me, and my services will be at your command.

Signed—GEO. D. SCHOFIELD."

Very truly yours,

Q. Now, why did you have Judge Schofield sign the agreement last winter with Dr. Sloan and yourself and Mr. Eisenlohr and several more?

A. Well, it was an outline that we would like to put through if we could.

Q. An outline of reorganization you mean?

(Deposition of E. E. Powell.)

A. Yes, sir, that we proposed to submit.

(Witness continuing:) Under that outline I was to have 25%. I don't know if it was in lieu of my holdings in the former companies. I was just asking for 25%. I was to have 15 % additional for the purpose of reorganization, for the purpose of making and drawing up this company and financing it. The 15% additional was not to be a bonus to me. It was intended as latitude to me in reorganizing. I was not giving Judge Schofield an interest in the reorganization. He had a certain interest the same as everybody else of notes held. They were going to bring in their notes, that was the outline they proposed to use if they had to bid it in. The note holders were to bid it in in the event of foreclosure. This was all conditional on foreclosure. At the time the agreement was signed, in the winter of 1914, there was no foreclosure, but there was a foreclosure contemplated; that is these people had some notes falling due and they had to do something with them. We were trying to get a plan together to take care of the foreclosure that was eventually going to be brought. There was another set of notes falling due and they were all embraced in one. My scheme was to embrace them all in one if I could; the combination outlined, that was what we wanted to follow if we could.

Q. Now, did you use the Schofield letter marked Plaintiff's Exhibit "A" and attached to this deposition, in getting Mr. Eisenlohr and others in the east to sign this plan of reorganization?

A. No, sir.



(Deposition of E. E. Powell.)

Q. You did not?

A. It wasn't for that purpose. [41]

(Witness continuing:) It was sent to some of them before they signed, but the majority have never seen it yet. Mr. Newton received the letter. He is the president of the Nome Consolidated Dredging Company. I think that Mr. Bremer received the letter also, but I am not sure of that. Dr. Sloan saw that letter, I think, but I am not sure of that. I have with me the agreement made between myself and William A. Ewing for the purchase of dredge No. 3 on Carnation Group, which I hand you; also the bill of sale from Ewing to myself. (Whereupon plaintiff offered in evidence the said agreement and said bill of sale, which were read and received in evidence and marked "Plaintiff's Exhibit 'B' and 'C' to Deposition"), being in words and figures as follows:

**Plaintiff's Exhibit "B" to Deposition of E. E. Powell  
—Agreement, September 23, 1914, Between  
William A. Ewing and E. E. Powell.**

**PLAINTIFF'S EXHIBIT "B."**

This agreement, made this day between WILLIAM A. EWING, of Nome, Alaska, hereinafter called "First Party," and E. E. Powell, of the same place, hereinafter called "Second Party," WITNESSETH:

That First Party, for and in consideration of the sum of One Dollar, and other valuable considerations, in hand paid by Second Party, the receipt whereof is hereby acknowledged, hereby agrees to

sell and convey unto Second Party, his heirs or assigns, all of the right, title and interest acquired by First Party under Execution Sale in Civil Cause No. —, District Court, District of Alaska, Second Division, in the case of William A. Ewing, plaintiff, against Ed. L. Smith, defendant, of, in and to the personal property sold to First Party under said Execution, and more particularly described in Exhibit "A" attached to this agreement, and by reference made a part hereof; said sale to be upon the following conditions, to wit:

1. The full purchase price of said property is the sum of THREE THOUSAND SEVEN HUNDRED AND THIRTY-FIVE and 55/100 DOLLARS (\$3,735.55), with interest on deferred payments from this date at the rate of 8% per annum.

2. Five Hundred Dollars (\$500.00) of said purchase price shall be paid on or before October 1st, 1914, and if such payment is not made, then this agreement shall be null and void, and the further provisions of this agreement of no force or effect whatsoever.

3. The remainder of the purchase price aforesaid shall be paid at such times and places within one year from the date hereof as said Second Party may be able to meet and make such payments. Time of payment is the essence of this agreement.

4. Each payment on said purchase price made by Second Party, his associates, heirs or assigns, shall *pro tanto* constitute a sale absolute and vest in Second Party, his associates, heirs or assigns, such proportionate interest in said property as such pay-

ments from time to time may bear to the total price, with interest [42] on deferred payments added to the time of each payment; the intention being that upon each payment made hereunder a like proportionate interest in said property shall become vested in Second Party, his associates, heirs and assigns, as such payment bears to the total purchase price.

5. Title and right of possession to said property shall be and remain in First Party, except as divested by payments hereunder, but upon such payments, then title and right of possession to said property shall vest in the parties hereto, in accordance with the payments made.

6. Upon final payment being made hereunder, First Party covenants and agrees to make, execute and deliver a Bill of Sale, with usual clauses, vesting all of his right, title and interest in said property in the purchaser or purchasers, according to payments made hereunder.

Each and every of the foregoing stipulations are subject to the agreement between the parties hereto that no sale or disposition of said property shall be made by Second Party, his associates, heirs or assigns (without the further written consent of First Party) until First Party shall have received the full purchase price of said property herein agreed upon with interest.

It is further specially agreed between the parties hereto that notwithstanding any covenant or agreement herein contained, this contract shall not be construed obligatory or binding upon Second Party, his associates or assigns, so as to be specifically en-

forced after the making of the first payment of Five Hundred Dollars (\$500) payable on or before October 1st, 1914.

IN WITNESS WHEREOF the parties hereto have this 23d day of September, 1914, executed this agreement in duplicate.

(Signed) WM. A. EWING. (Seal)

(Signed) E. E. POWELL. (Seal)

In presence of:

GEO. D. SCHOFIELD.

T. M. REED.

Territory of Alaska,  
Cape Nome Precinct,—ss.

THIS CERTIFIES that on this 23d day of September, 1914, before me, the undersigned, a notary public within and for said Territory, personally came William A. Ewing and E. E. Powell, to me known to be the identical persons described in and who executed the within instrument and they acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

WITNESS my hand and official seal at Nome, Alaska, on the day and year in this certificate first above written.

[Seal]

GEO. D. SCHOFIELD,

Notary Public for Alaska.

My commission expires July 6, 1918.

(See Exhibit "A" attached.) [43]



## EXHIBIT "A."

LIST OF PERSONAL PROPERTY SITUATE  
ON CARNATION PLACER CLAIM ON  
FLAT CREEK, IN CAPE NOME MINING  
DISTRICT, ALASKA.

- 1 unfinished dredge:
- 2 pieces of timber 18"x 8"x54'
- 1 " " " 18"x 8"x20'
- 2 " " " 20"x20"x20'
- 58 " " lumber 4"x6"x24'
- 4 " " " 3"x6"x24'
- 20 " " " 2"x6"x24'
- 9 " " " 2"x3"x24'
- 6 " " " 4"x6"x30'
- 10 " " " 6"x6"x30'
- 1200 " " various sizes of lumber (Asstd.  
mostly 1" brd.)
- 17 large steel plates—asst.
- 1 lot of small steel plates
- 9 shieve housings
- 12 large hanging rods
- 20 large iron straps
- 1 anvil
- 6 small hanging rods
- 27 boxes small asst. bolts, nuts and castings
- 24 kegs of assorted bolts, nuts and castings
- 60 bolts, 3' long
- 20 bolts, 6' long
- 8 bolts, 8' long
- 1 large spud, weight approximately 17 tons
- 2 steel bars 8"x6"x12"

10 castings for bearings

400 lbs. of coke—about

800 lbs. of angle iron straps—about

A lot of miscellaneous fittings.

The foregoing list of personal property is a complete description of that certain property named and designated in contract this day executed between William A. Ewing and E. E. Powell, and to which this list is attached.

Dated September 23, 1914.

**Plaintiff's Exhibit "C" to Deposition of E. E. Powell  
—Bill of Sale, October 1, 1914, Between William  
A. Ewing and E. E. Powell, Trustee.**

**PLAINTIFF'S EXHIBIT "C."**

**BILL OF SALE.**

KNOW ALL MEN BY THESE PRESENTS:  
That I, WILLIAM A. EWING, of Nome, Alaska, the party of the first part, for and in consideration of the sum of FIVE HUNDRED DOLLARS (\$500.00) to me in hand paid by E. E. Powell, trustee, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, an undivided TWO-FIFTEENTHS (2/15) interest of, in and to dredge No. 3 on Wonder Creek, in Cape Nome Mining District, Alaska, together with all appliances and parts thereto, reference being had for a more complete description of said property [44] to the United States marshal's Bill of Sale of the same conveying title therein to said William

A. Ewing, recorded in Volume 197 at page 257 of the records of said district, and being Instrument No. 60,521 of said records.

To have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever.

IN WITNESS WHEREOF I have hereunto set my hand and seal on this 1st day of October, 1914.

WM. A. EWING. [Seal]

In presence of:

GEO. D. SCHOFIELD.

GEO. W. DUTTON.

Taken and acknowledged before me by William A. Ewing on this 1st day of October, 1914, as his free and voluntary act and deed.

[Seal]

GEO. D. SCHOFIELD,

Notary Public for Alaska, Nome.

(My commission expires July 6, 1918.)

(Witness continuing:) I also have with me the assignment and certificate of sale of J. M. Sloan for dredge No. 3, which I hand you.

(Whereupon plaintiff offered the assignment of judgment and Bill of Sale from J. M. Sloan to E. E. Powell in evidence and the same were read and received in evidence as Plaintiff's Exhibit "D" and Plaintiff's Exhibit "E" to the deposition, being in words and figures as follows, to wit:)

**Plaintiff's Exhibit "D" to Deposition of E. E. Powell  
—Assignment of Judgment in Sloan v. Smith.**

**PLAINTIFF'S EXHIBIT "D."**

*"In the District Court for the District of Alaska,  
Second Division.*

J. M. SLOAN,

Plaintiff,

vs.

ED L. SMITH,

Defendant.

**ASSIGNMENT OF JUDGMENT.**

KNOW ALL MEN BY THESE PRESENTS, that I, J. M. Sloan, Plaintiff and Judgment Creditor herein, for a valuable consideration to me in hand paid by —, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over to the said — all my right, title and interest in and to the Judgment rendered and entered on the — day of October, 1914, and entered of record in Judgment docket — at page — of the records of said court, hereby authorizing the said — to use all lawful ways and means at — own proper costs and charges to enforce the collection of the same.

ALSO by these presents hereby selling, assigning, [45] transferring and setting over to the said — all personal property heretofore sold under the execution issued in said court and cause.

WITNESS my hand and seal at Seattle, Washington, on this — day of November, 1914.

J. M. SLOAN. [Seal]



In presence of:

GEO. D. SCHOFIELD.

GEO. W. DUTTON.

State of Washington,

County of King,—ss.

THIS IS TO CERTIFY that on this 12th day of November, 1914, before me, the undersigned, a notary public in and for said State duly commissioned, sworn and qualified, personally appeared J. M. Sloan, to me known to be the same person described in, and who executed the foregoing assignment of Judgment and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal on this 12th day of November, 1914.

[Seal]

W. W. DEARBORN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

My commission expires Mar. 9th, 1919.

**Plaintiff's Exhibit "E" to Deposition of E. E. Powell**  
—**Bill of Sale of J. M. Sloan.**

PLAINTIFF'S EXHIBIT "E."

"BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS, that I, J. M. Sloan of Nome, Alaska, for a valuable consideration to me in hand paid by —, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over to the said —, all my right, title and interest, as acquired by me under execution sale in the case of J. M. Sloan, Plain-

tiff, Ed L. Smith, Defendant, heretofore pending in the District Court for the District of Alaska, Second Division, of, in and to all personal property sold under execution issued out of said cause, reference being hereby had and made to the return of the United States marshal on the writ of execution for a particular description of said personal property, described in general, as follows:

Dredge No. 3 situated on Wonder Creek near Flat Creek, together with all machinery and appliances thereunto belonging or in anywise appertaining;

All dredge machinery and appliances situate at the John J. Sesnon docks and warehouses at Nome, Alaska, subject to the legal lien of said last-named company for freight, wharfage and storage charges; [46]

Two certain promissory notes in the sum of Twenty-five Hundred Dollars (\$2,500) executed by the Nome Consolidated Dredging Company, Payor, to Ed L. Smith, Payee;

All of which said property is fully described in the returns from said execution, and is situated in Cape Nome Precinct, Alaska.

TO HAVE AND TO HOLD all of said described personal property under the said — forever.

WITNESS my hand and seal at Seattle, Washington, this — day of November, 1914, the intention being that the said — shall at — own proper charges and expenses, use all lawful ways and means to reduce the same to possession, or collect the same.

J. M. SLOAN. [Seal]

In presence of:

GEO. D. SCHOFIELD.

GEO. W. DUTTON.

State of Washington,

County of King,—ss.

THIS IS TO CERTIFY that on this 12th day of November, 1914, before me the undersigned, a notary public in and for said State duly commissioned, sworn and qualified *and qualified*, personally appeared J. M. Sloan, to me known to be the same person described in, and who executed the foregoing Bill of Sale, and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

WITNESS my hand and official seal on this 12th day of November, 1914.

[Seal]

W. W. DEARBORN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

My commission expires Mar. 9, 1918."

(Witness continuing:) This agreement and assignment all grew out of a suit entitled J. M. Sloan, plaintiff, versus Ed L. Smith. Judge Schofield was the attorney for the plaintiff, I think, for the Alaska Dredging Company, who owned the property, and J. M. Sloan was simply bringing it in his name. Sloan had no personal interest in it at all. I have no personal interest in Dredge No. 3, none whatever.

I own about one-sixth of the capital stock of the Alaska Dredging Company.

Q. Is there no one else interested in that company other than you or your brothers?

(Deposition of E. E. Powell.)

A. Yes, sir. [47]

Q. Who are the other stockholders?

A. Herman Beckman, J. D. Trenholme and I think the estate perhaps of Sol Simson.

Q. What amount of the stock do they own outside of you and your brothers, what proportion?

A. About a third.

Q. Then the Powell family controls two-thirds?

A. Nearly so, I think, not quite that.

(Witness continuing:) I think No. 3 dredge, or what is called the Flat Creek dredge, now stands in my name as trustee, E. E. Powell, trustee. The dredge stands on a placer claim known as the Carnation Group claim. The title of that claim stands in the name of E. E. Powell, trustee. I bought it at marshal's sale, I bid it in at the foreclosure suit sale. I bid it in personally at that sale. I have not made any transfer of it since.

I have with me the Articles of Incorporation of the Nome Holding Company, and also a letter of advice or comment, or whatever you have a mind to call it, because the company was made without my knowledge at the time it was made, in regard to the reorganization of the Nome Holding Company. I simply was talking about it in Seattle and they sent the articles to me.

(Whereupon plaintiff offered in evidence the Articles of Incorporation and the letter of advice referred to, all of which were received in evidence and marked Plaintiff's Exhibit "F" and "G," respectively.) Said exhibits being in words and figures as follows:



**Plaintiff's Exhibit "F" to Deposition of E. E. Powell—Articles of Incorporation of the Nome Holding Company.**

**PLAINTIFF'S EXHIBIT "F."**

**"ARTICLES OF INCORPORATION OF THE NOME HOLDING CO.**

**THESE PRESENTS WITNESS:** That we, J. D. Trenholm, Geo. W. Dutton and F. S. Powell, citizens of the United States and residents of the State of Washington, being desirous of forming a corporation for the purposes hereinafter specified and in conformity to the laws of the State of Washington, do hereby make and subscribe the following written articles of incorporation in triplicate:

**ARTICLE I.**

**Name.**

The name of this corporation shall be **NOME HOLDING CO.** [48]

**ARTICLE II.**

**Objects and Purposes.**

The objects and purposes for which this corporation is formed is and shall be:—

First. To acquire rights and titles by grant, option, purchase, lease or otherwise, to gold, silver, or other mineral claims, lands and deposits, situated in the State of Washington, District of Alaska, or elsewhere, in the manner provided by law, and to open, develop and mine such deposits and lands by the use of dredges, hydraulic plants, sluicing or other methods, and to carry on the general business

of mining gold, silver and other minerals for itself or as agent for others, and to deal in and deal with mines and mining properties, and to alienate, sell, encumber, lease, assign, transfer, mortgage, pledge or otherwise dispose of any of its rights, interests and properties, in whole or in part, as it may from time to time determine.

Second. To acquire by grant, purchase, lease or otherwise, and to use, hold and enjoy any and all water rights, franchises, rights and privileges, public and private, and to sell and otherwise dispose of the same, and to operate the same for its own use or for others for hire.

Third. To construct, purchase, charter, lease, own, operate, sell or otherwise dispose of transportation lines, whether by land, water, air or otherwise, to transport its products, and to carry passengers, freight and articles of value for others for hire.

Fourth. To construct, lease, own, operate and otherwise acquire telegraph and telephone lines or other means of communication, and to sell and otherwise dispose of the same, and to charge and collect tolls for the transmission of messages for others.

Fifth. To construct, acquire, lease, own, operate and maintain shops and plants for manufacturing dredging and other machinery for its own use and for others, and to carry on a general manufacturing business.

Sixth. To construct, provide, acquire, carry out, maintain, improve, manage, develop, control, take on lease or agreement, sell, assign, let, lease, license to use, work, use, operate or dispose of electric light or

power plants, electric light or power lines, quays, wharves, docks, bunkers, bridges, reservoirs, canals, water-courses, hydraulic works, electric works, gas or oil works, gas or other factories, furnaces, warehouses, shops, buildings, dwellings for employees and others, and all other works and conveniences.

Seventh. To buy, acquire, own, handle, deal in and deal with any and all kinds of goods, wares and merchandise, gold, silver and other minerals, and to carry on a general mercantile business.

Eighth. To borrow money upon bonds, notes, mortgages or other obligations, to issue bonds and debentures, and [49] to mortgage and hypothecate any and all of the property of the corporation to secure the payment of the same.

Ninth. To hold, purchase, or otherwise acquire, sell, assign, transfer, mortgage, pledge, hypothecate or otherwise dispose of shares of the capital stock, bonds, debentures or other evidence of indebtedness created by any other corporation or corporations, and while the owner thereof, to exercise all the rights and privileges of ownership, including the right to vote thereon.

Tenth. To have, exercise, possess, use and enjoy such other rights, privileges, franchises and powers as may from time to time be deemed profitable, useful or necessary, or incidental to the powers herein enumerated or requisite, or proper in the conduct of the business of this corporation, as authorized by law.

ARTICLE III.

Capital Stock.

The amount of the capital stock of this corporation shall be Fifty Thousand Dollars (\$50,000), and the same shall be divided into fifty thousand (50,000) shares of the par value of One Dollar (\$1.00) each, and said stock shall be non-assessable and fully paid.

ARTICLE IV.

Term of Existence.

The time of existence of this corporation shall be fifty (50) years from the date thereof.

ARTICLE V.

Trustees.

The number of trustees of this corporation shall not be less than three (3) or more than nine (9) and the names and residences of the trustees who shall manage the concern of this corporation until the 16th day of August, 1915, or until their successors are qualified, are:

Names.	Residences.
J. D. Trenholm,	Cor. 10th Ave. & 75th N. E., Seattle, Wn.
Geo. W. Dutton,	#415 Madison St.
F. S. Powell,	#1243—5th Ave., N.

ARTICLE VI.

Principal Place of Business.

The principal place of business of this corporation shall be located in the City of Seattle, County of King, State of Washington.

IN WITNESS WHEREOF we have this 16th day



of June, A. D. 1915, hereunto set our hands and seals in triplicate. [50]

J. D. TRENHOLM, (Seal)

GEO. W. DUTTON. (Seal)

F. S. POWELL. (Seal)

Signed, sealed and delivered in presence of:

W. W. DEARBORN.

State of Washington,

County of King,—ss.

I., W. W. DEARBORN, a notary public in and for the State of Washington, duly commissioned, sworn and qualified, do hereby certify that on this — day of June, A. D. 1915, before me personally appeared J. D. Trenholm, Geo. W. Dutton, and F. S. Powell, to me known to be the individuals described in and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given over my hand and official seal this 15th day of June, A. D. 1915.

[Seal]

W. W. DEARBORN,

Notary Public in and for the State of Washington,

Residing at Seattle.

(Commission expires Mar. 9, 1918.)”

**Plaintiff's Exhibit "G" to Deposition of E. E. Powell—Letter, July 26, 1915, Powell to Powell.**

**PLAINTIFF'S EXHIBIT "G."**

Nome, Alaska, July 26th, 1915.

Mr. F. S. Powell,  
#324 New York Block,  
Seattle, Wash.

Dear Brother:—

On receipt of this if you have got your organization completed, get into communication with Mr. M. W. Newton (copy of whose letter I herewith enclose you) as he will probably write you and request you to put him on the Board of 3 Trustees; this gives you a majority there at Seattle to transact business with.

Let Mr. Trenholme resign and that will leave you and Dutton on the Board. Mr. Trenholme probably does not want to be bothered with it. See my letter to Mr. Newton.

Write Mr. Newton and tell him you are ready to put him on and when this is completed I will turn the property over to the company.

Also send me in my authority to transact business the same authority given me in the N. C. Company.  
[51]

(Witness continuing:) Geo. W. Dutton is an accountant at Seattle. He is not in the employ of my brother or myself. He was in our employ one year, one season.

Since 1909 I have acquired a number of mining claims in the Nome District personally, and I have some standing in my own name.

(Deposition of E. E. Powell.)

I bought the one-half interest in Lake Creek in 1905 or 1906 from Fred Anderson. It still stands in my own name. I hold it in my own name to be deeded to the interests represented whenever they are ready to pay for it. I claim it as my personal property. I could not sell it, in other words, it is under contract. As soon as they pay me the amount of money that I advanced, with interest, I will deed it to them. By interests represented I mean the same interests that I am holding all this stuff for at this time.

Q. The Nome Holding Company?

A. They are the people that will eventually take it, by "them" I mean the note holders, as soon as they pay me the money I advanced with 8% interest I am to turn it over to them.

(Witness continuing:) That amount is three thousand dollars or thirty-five hundred dollars, I have forgotten which. The claim still stands in my name. I delivered a statement to certain gentlemen.

Q. Now, this statement that you referred to as having been submitted at the time the Nome Consolidated Dredging Company was organized. To whom was that submitted?

A. The directors of the—or three or four gentlemen at least, that used to be interested in the Wonder Dredging Company, I think Mr. Eisenlohr and Mr. Newton and Mr. Bremer.

(Witness continuing:) It was simply an offer to sell the ground. It is understood that this is to be

(Deposition of E. E. Powell.)

done when they have the money to do it with. I consider myself bound to sell.

I have an interest in No. 2 on Lake Creek. I bid that interest in. I acquired it the other day on a judgment. I bid it in on the judgment the other day in a suit brought in my name against the Anvil Hydraulic and Drainage Company. I sold the Anvil Hydraulic and Drainage Company's interest in the claim and bought it in myself. I claim to own it for the interests represented in the Anvil Hydraulic and [52] Drainage Company which are co-interested with me in the entire proceedings, three-fourths of the bondholders, etc., and those standing with me. I brought suit against the Anvil Hydraulic and Drainage Company entitled E. E. Powell versus the Anvil Hydraulic and Drainage Company for some twenty-seven thousand dollars for personal services and money advanced, for myself and others. I obtained a judgment and sold the property of the Anvil Hydraulic and Drainage Company and bid it in myself. I own the property that I bid in for the parties interested with me in this proceeding, in the judgment I got against the Anvil Hydraulic and Drainage Company. I refer to Mr. Turner, my brother, Judge Schofield, and I think that there were other interests outside of that. I had two or three assigned claims embodied in the judgment.

Q. Has anybody else got any interest in this property other than those?     A. Yes, sir.

Q. Who are they, name some of them?

A. Colonel W. T. Perkins.

Q. Who else?



(Deposition of E. E. Powell.)

A. I don't know just who will be interested.

Q. Name some of them. You know who you are holding it for.

A. Yes, sir, I know who I am holding it for.

Q. Name some of them.

A. At the present time I don't intend to name them.

(Witness continuing:) Colonel Perkins did not have any interest in the suit for \$27,000.00 for salary and money advanced, neither did J. D. Houghton or Mrs. Watson Allen. I do not know how much of this \$27,000.00 I claim for myself, I have no way of knowing at the present time.

Q. Now, Mr. Powell is there anybody else interested in the property that you bid in in the case of E. E. Powell versus the Anvil Hydraulic and Drainage Company other than Col. W. T. Perkins?

A. There probably will be.

(Witness continuing:) I don't know, there probably is. I could not give you the name or address of any who will know who would be interested.

I acquired an interest in No. 3 Below Discovery on Dry Creek I think in 1911 from a man named Moore. Judge Schofield patented that claim for me and it stands in my name to-day. The combination of interests to-day have the same option on that claim that they have on the others. [53]

Q. The Nome Holding Company?

A. Their interest at that time, yes, sir.

(Witness continuing:) The proposition or letter that I submitted to the gentlemen that tied up the

(Deposition of E. E. Powell.)

mining claims was submitted to the men who afterwards became directors of the Nome Consolidated Dredging Company. I would think more particularly to my associates. They did become directors of the Nome Consolidated Dredging Company later on. The claims were tied up to these gentlemen personally; they were Mr. Eisenlohr and Mr. Newton; and Mr. Newton particularly; Mr. Newton being the president of the Nome Consolidated Dredging Company; Mr. Eisenlohr was a principal stockholder.

The Nome Consolidated Dredging Company was organized subsequent to the Nome Mining Company, that is, the Nome Mining Company was first organized and then the Nome Consolidated Dredging Company was later organized. These gentlemen to whom I submitted the proposition subsequently organized the Nome Consolidated Dredging Company and became its officers.

The Bonanza claim east of town stands in my name as trustee.

Q. As trustee for whom?

A. For all interests.

Q. For the Nome Holding Company?

A. Yes, sir, or for whatever disposition the owner makes.

Q. Or those that are the organizers?

A. Yes, sir.

(Witness continuing:) The same conditions pertain to the Anderson claim east of town. It is to be the property of the Nome Holding Company if the owners so authorize me.

(Deposition of E. E. Powell.)

I don't know at this time what interest I am to have in the Nome Holding Company. I have not instructed F. S. Powell what percentage of stock to subscribe for me. I don't know if all the stock is to be issued to me and sold by me, I have not so instructed F. S. Powell.

Q. This Nome Holding Company now is to be controlled solely by Mr. Dutton and your brother as the managing directors?

A. No, sir, I don't know at this time whether they are even on the board or not, they may be.

(Witness continuing:) I have not issued any instructions but they organized with [54] a board of three trustees consisting of Trenholme, Dutton and F. S. Powell.

Q. Was not that board organized with the sole understanding and agreement that Trenholme would then resign?

A. I don't know, I didn't talk to Trenholme, but I presume that that is true.

(Witness continuing:) I did not send instructions to that effect. Wait a moment. I am not sure. It seems to me there was a letter sent to that effect but I haven't got it here. Judge Schofield didn't draw the Articles of Incorporation, he never saw them until they were sent in. They were drawn outside and sent in to me.

Q. Is it not a fact those Articles of Incorporation used by the Nome Holding Company were copies of the Articles of Incorporation of the Nome Consolidated Dredging Company?

(Deposition of E. E. Powell.)

A. Yes, sir, I think so.

(Witness continuing:) They were not marked with the amount of capital stock here in Nome and sent outside. I fixed the capital stock at \$50,000.00—that is what we talked when we were in Seattle. I don't know who selected J. D. Trenholme, F. S. Powell and Geo. W. Dutton as trustees, I did not have any hand in it.

Q. Is it not a fact that Judge Schofield suggested to you the plan in your office here in Nome of fixing the capital stock at fifty thousand dollars so that it could be apportioned *pro rata* on the twenty-five thousand dollar mortgage at double the price of the Thatcher mortgage? A. Yes, sir.

(Witness continuing:) The Articles I drew up at that time and made copies of it, but before I could send them out the Articles of Incorporation came in here from Seattle.

Q. Did you intend to *pro rata* the capital stock of the Nome Holding Company on the basis of the notes in the Thatcher mortgage?

A. I did, yes, sir, with proper protection for the other \$200,000.00. [55]

(Witness continuing:) I don't know whether or not it was in pursuance of that that the subscription stock of the Nome Holding Company was fixed at fifty thousand dollars.

Q. Now, Mr. Powell, is that not in conformity with the terms of the original agreement that was signed last winter by Dr. Sloan, Judge Schofield, yourself and others? A. I think so.



(Deposition of E. E. Powell.)

(Witness continuing:) I told Judge Schofield before he brought this suit against me that the original plan had fallen through—that I had received a telegram to that effect. Under the original plan Judge Schofield was not to have three-fiftieths, he was to have nothing, neither was any one else. That was the plan we wished to follow if we could.

Q. It was to be apportioned on the basis of the amount of the Thatcher notes?

A. The people holding them, if they wanted to, over half of them haven't signed anything.

(Witness continuing:) I don't know whether it was to be on that basis that the Nome Holding Company was to be divided or not. That was the way we would like to have it. I never told Judge Schofield on any occasion that he was to have three-fiftieths in the reorganization plan.

Q. Yet you had him join in the contract last winter and you testify now you were to divide all stock in the Nome Holding Company on the basis of the notes held in the Thatcher judgment?

A. If we could, yes, sir, as he held some of the notes he would be entitled to participate in the event he retained his interest in the foreclosure and we were successful bidders only.

Q. Now, Mr. Powell, what value do you place on the holdings, real and personal, belonging to the Nome Holding Company, or that will belong to it when it is deeded over to it?

A. I don't know what the real value of it is. [56]

Q. I asked you what value do you put on it, on the

(Deposition of E. E. Powell.)

properties that are to be deeded over or given a bill of sale to this company, the Nome Holding Company, to be organized?

A. I presume it is worth probably two hundred thousand dollars.

Q. That includes the three dredges?

A. Yes, sir.

Q. And the mining property that was bid in at the Thatcher sale as well as other interests?

A. Yes, sir. That includes that of course in the two hundred thousand dollars, as well as the Thatcher mortgage.

(Witness continuing:) We carry on our books the holdings of the Nome Consolidated Dredging Company at seven hundred thousand dollars. That was all bid in at the Thatcher sale by me individually but held by me as trustee.

Q. And this is all to be deeded over to this new company?     A. Yes, sir.

Q. And to be apportioned under the plan you outlined?     A. I don't know as to that.

Q. Has any one any authority to change the plan of apportionment?     A. Yes, sir.

Q. Who?

A. All these note holders have authority to.

(Witness continuing:) If they ratify the plan as outlined I don't know whether it will be apportioned on the basis of the Thatcher judgment or not.

Q. Now, what was the amount of the notes held by you in the Thatcher judgment?

A. Fifteen hundred dollars.

(Deposition of E. E. Powell.)

Q. Out of a total of twenty-five thousand dollars?

A. A total of \$238,000.00.

Q. I am speaking of the Thatcher mortgage?  
[57]

A. Yes, sir, but this is subject to the other as well.

Q. These so-called Darling notes were mostly held by the Alaska Dredging Company, were they not?

A. No, sir, it held \$113,000, I guess it is.

(Witness continuing:) I bid the Lawrence placer claim in in my judgment against the Anvil Hydraulic & Drainage Company. I hold it under the same conditions for the interests, the organization or reorganization to be made. It was patented and stands in the name of the Nome Consolidated Dredging Company. The Bob Lyng claims Nos. 8, 9 and 10 Below on Dry Creek, were purchased from Bob Lyng for the company in my name. They were purchased on contract for the Nome Consolidated Dredging Company. They were sold in the Thatcher foreclosure suit.

I have a personal interest also in No. 1 and 2 Saturday Creek, a one-thirty-second interest.

The Yellow Jacket claim stands in the name of the Alaska Dredging Company. Claim No. 3½ on East Bourbon was bought in by me in my judgment against the Anvil Hydraulic & Drainage Company, as well as Fraction No. 1 Mine on East Bourbon and Lucky Fraction on East Bourbon and a portion of the Northern Queen.

Q. This Darling mortgage that was made out last September, in 1914, for two hundred thousand dol-

(Deposition of E. E. Powell.)

lars. Who prepared that mortgage?

A. Judge Schofield—that is W. S. Furst, our attorney in Philadelphia, prepared it and forwarded it to me and Judge Schofield changed the affidavit of intent.

Q. Was that done at his suggestion or yours?

A. Mine, after my attention was called to it by Mr. Orton who was taking care of the bank's interest.

(Witness continuing:) That was delivered to me for the different interests. I put the Darling mortgage on record. There was some two hundred thousand dollars worth of notes made out. They were delivered to the different parties holding them.

Q. When?

A. Along in the winter, delivered personally, from the time I reached Seattle until I got back east.

Q. Give me the names of some of the ones you personally delivered those notes to. [58]

A. Well, the Alaska Dredging Company, M. W. Newton and Louis Eisenlohr.

Q. To whom did you deliver the Alaska Dredging Company's notes? A. To F. S. Powell.

Q. When did you deliver Mr. Eisenlohr's notes?

A. When I arrived in the east, about a month after I arrived.

(Witness Continuing:) Mr. Eisenlohr has never held the notes for any length of time. The delivery of the notes was about the first of December, 1914, somewhere about that time. I delivered the notes to Mr. Eisenlohr by telling him that I had them as I



(Deposition of E. E. Powell.)

had notified all the note holders, both the Thatcher notes and these others.

Q. Did you ever part with the possession of any of those notes yourself?      A. Yes, sir.

Q. Did you part with the possession of Mr. Eisenlohr's notes by delivering them to him—or did you retain them in your possession?

A. I parted with them. He had them for a few days while he signed them and endorsed them over to me.

Q. When was that? When did he endorse them?

A. About March or April.

Q. What other notes of that issue of two hundred thousand dollars under the Sloan or Darling mortgage, did you part with?      A. All of them.

Q. Well, give me the dates of one and to whom. You stated that you turned over \$113,000 worth of notes to F. S. Powell?      A. Yes, sir.

Q. When was that?

A. That was along in the fall in 1914. I took them east with me. I am one of the directors of the Alaska Dredging Company.

Q. And did you part with them yourself, or did you retain the notes and just tell F. S. Powell you had them? [59]

A. No, sir; they were left in the office, there.

(Witness Continuing:) I turned them over to F. S. Powell for less than a week or two and he then turned them back to me. I was in Seattle two weeks before I went east in the fall of 1914 and I did not return to Seattle until the last of May or first of

(Deposition of E. E. Powell.)

June, 1915. I had the notes in my possession while I was in the east.

Q. And you had Eisenlohr's notes? A. Yes, sir.

Q. And you took Mr. Newton's notes?

A. Yes, sir.

Q. And the Alaska Dredging Company's notes?

A. Yes, sir.

Q. Did you ever part with any of those notes other than you described to your brother for a week?

A. No, I had the notes in my possession all the time as custodian for all interests other than as stated.

Q. Didn't you write the payees' names on each of those notes after you arrived in Nome in 1915?

A. Yes, sir; some of them.

Q. That is a fact? A. Yes, sir.

Q. So that Mr. Eisenlohr's name never appeared in the notes at all at the time you say you delivered them to him?

A. His endorsement appears on the back.

Q. His name as payee didn't appear?

A. I think I wrote it in myself.

Q. In June when you arrived in Nome?

A. Yes, sir.

Q. And about the time Mr. Darling was substituted for trustee? A. Yes, sir.

Q. About the time Mr. Darling was substituted for trustee and including the Alaska Dredging Company? [60] A. Yes, sir.

(Witness Continuing:) The writing of the payees' names in those notes and the substitution of Darling

(Deposition of E. E. Powell.)

as trustee and the foreclosure and use of those notes in bidding at the marshal's sale was not all done under the advice of Judge Schofield. It was not done for the sole purpose and no other purpose of preventing legitimate, *bona fide* bidders participating in the sale. It was done for the security of the people to be secured. It should have been taken in the first place to secure themselves.

Q. Did you not discuss with Judge Schofield the advisability of using those notes at the marshal's sale to prevent legitimate bidders bidding at that sale?      A. Yes, sir.

Q. And did not Judge Schofield advise you that if the Court permitted you in a decree to use those notes that you would shut off competition at the sale up to the extent of \$225,000?

A. Yes, sir, as other attorneys advised me before he got into the case at all.

(Witness Continuing:) I am the same E. E. Powell who was a party to the various suits mentioned by you in the District Court.

Q. When you were in the east in Philadelphia this spring, before you left did you request the authorities, your Philadelphia lawyers to correspond with Judge Schofield about the foreclosure of the Thatcher mortgage?

A. In the course of conversation with the company's Philadelphia attorney and discussing the mortgages, he decided to write Mr. Schofield as to the procedure of foreclosure.

(Signed) E. E. POWELL. [61]

Plaintiff thereupon offered in evidence the affidavit of D. B. Chace, which said affidavit was, over the objection of the defendant Alaska Mines Corporation, as to its competency, read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of D. B. Chace.**

(Title of Court and Cause.)

United States of America,  
Territory of Alaska,  
Second Division,—ss.

D. B. Chace, being duly sworn, on oath deposes and says: That she is a stenographer and typewriter and has been engaged in such business in Nome, Alaska, for several years last past; that on the 31st day of August, A. D. 1915, at the hour of 2 o'clock P. M. of said day, affiant was employed by the plaintiff and his attorney in the case of George D. Schofield, plaintiff, versus E. E. Powell, defendant, No. 2625, in the District Court for the District of Alaska, Second Division, to report for the plaintiff the testimony of plaintiff, George D. Schofield in said action and now one of the defendants in this case. That on said date in the office of Ira D. Orton, one of the attorneys for the defendant in said action, in the presence of the said Ira D. Orton, O. D. Cochran, E. E. Powell, and William A. Gilmore, the said George D. Schofield was sworn by Lawrence Kerr, a Notary Public in and for the Territory of Alaska, before whom his deposition was given in said action, and thereupon his testimony was taken down in



shorthand by affiant and thereafter transcribed into typewriting by affiant, said witness at said time testifying as follows:

**Deposition of George D. Schofield.**

**Direct Examination.**

Q. (By Mr. ORTON.) Mr. Schofield, you are the plaintiff in this case, I believe?    A. I am. [62]

Q. How long have you known Mr. Powell?

A. Oh, I should judge fourteen or fifteen years.

Q. You brought this suit against Mr. Powell for legal services which you claim to have performed for him personally, is that it?    A. Certainly.

Q. Now, did you have any contract with Mr. Powell as to your compensation for these alleged services?

A. I had an agreement with him, certainly.

Q. When did you make that agreement?

A. That agreement was made when I was first employed by Mr. Powell, I should say that was in the fall of 1909, the late summer or fall of 1909.

Q. Was this agreement oral or in writing?

A. Oral.

Q. When was it entered into?

A. Well, at the time I was employed by him originally, the winter that Judge Du Bose went out.

Q. What were the terms of the contract?

A. Well, the terms of the contract were coupled with an employment for a number of companies Mr. Powell at that time represented.

Q. What were these companies?

A. Anvil Hydraulic & Drainage Company, the

(Deposition of George D. Schofield.)

Alaska Dredging Company, the Wonder Dredging Company; I believe that was all at that time.

Q. What were the terms of the employment?

A. The terms of the employment I cannot give because I would have to refer, so far as the companies are concerned; the employment was embodied in a letter written by Mr. Powell [63] to myself. At that time Mr. Clowes had sued, about that time, he had commenced an action against the Anvil Hydraulic & Drainage Company and E. E. Powell, the defendant in this suit. I entered into an agreement with him to appear in all cases for these companies and to attend to Mr. Powell's private business, whatever it might be.

Q. And what were the terms?

A. The terms, as I say, were embodied in that letter, so far as the companies were concerned, but it was to be whatever my services would be worth, a reasonable compensation for my services. At that time Mr. Powell had in view an amalgamation of companies and we didn't know then what the work would be, but the agreement was that I would be practically in and in with him on certain combinations that were thereafter to be formed. The amount of my compensation was not fixed except this, that it would be a reasonable compensation whatever work I might do for him.

Q. Was the matter of your personal services to Mr. Powell brought up at that time in your first conversation when you entered into this written agreement with the companies?

(Deposition of George D. Schofield.)

A. I believe it was along that time. It was the same proposition he had with Judge Du Bose at that time.

Q. Judge Du Bose was living at that time, was he not? A. Yes, sir, he was.

Q. Was he to discontinue his services?

A. He had not, but he died that year. I believe, if I am not mistaken, on the outside.

Q. Did you have a conversation with Mr. Powell particularly about your legal services to him personally at that time? A. Yes, sir; certainly.

Q. And what was the conversation you held with reference to [64] being in and in with him, just state that?

A. The proposition was if these organizations were to be gotten together, in the fall of 1909,—no, the next year,—we took up the matter of the organization of the Nome Consolidated Dredging Company.

Q. Were you to get a percentage?

A. There was no percentage fixed for a number of years, but later there was.

Q. And during the several years from 1909 to the present time, or the present year, you had a written contract with the companies, did you not?

A. In the form of a letter, yes, sir.

Q. Did you have any written contract with Mr. Powell with reference to legal services to be performed for him? A. No, sir.

Q. Was this arrangement which you have stated in which you state that you were to receive a reason-

(Deposition of George D. Schofield.)

able value for your services, ever changed or modified in any way?

A. Well, not except as attempted to be changed by Mr. Powell.

Q. How did he attempt to change it, and when?

A. Well, he attempted to change it when he refused to give me the interest that I was to have in the formation of the plan or amalgamation this year for consolidating his interests.

Q. Did you ever, at any time, render a bill to Mr. Powell for any of the services performed by you under this arrangement? You say you were to receive the reasonable value of your services?

A. I did not.

Q. Why not?

A. Because I was to have an interest in the thing until he [65] forced me out absolutely; there was no necessity for rendering any bill.

Q. Do you mean by that you were to receive an interest in this amalgamation in lieu of the reasonable value of your services, is that the idea?

A. I was to receive it in lieu?

Q. Yes.

A. I was to receive the reasonable value of my services and that was fixed by Mr. Powell in the fall of 1914 after I had drafted and formulated the amalgamation and the manner of foreclosure, that was fixed at a definite amount.

Q. What was the amount?

A. It was to be a one-nineteenth at that time.

Q. Of what?



(Deposition of George D. Schofield.)

A. Of whatever properties that went into the amalgamation. Mr. Powell held certain claims in his name, certain claims in the name of the Nome Consolidated Dredging Company, certain claims in the name of the Anvil Hydraulic & Drainage Company and the formulation of this plan was to wipe out, as it were, all of these companies and form one corporation in which I was to have at that time a 1/19ths interest. I was to have nineteen dollars for every dollar that the company then owed me and was to have the money back that the company owed me, with one per cent interest.

Q. You speak of the money which the company owed you. What money do you mean?

A. The money that all the companies owed me. We talked it over, and Mr. Powell figured it at \$5,000 at that time.

Q. When was this agreement made?

A. That agreement was made,—it assumed that form in the fall of 1914 through Mr. Powell's own dictation. [66]

Q. Did you agree to that?

A. That was satisfactory to me, yes, sir; at that time.

Q. State as definitely as you can when it was that plan was definitely agreed to between you and Mr. Powell.

A. As I stated, that was in the fall of 1914.

Q. I asked you to state as definitely as you could with reference to what part of the fall?

A. I have already stated, it was while we were

(Deposition of George D. Schofield.)

formulating the mortgages that were sent east, that were changed as you well know at your own dictation to cover certain relations of the bank and the Nome Consolidated Dredging Company.

Q. Now, at the time you made this agreement by which you say you were to receive a 1/19th part, that is 1/19th part of what?

A. As I have already stated, of the combined deal. That was all to be formulated into what now stands as the Nome Holding Company. That company was organized on the basis of \$50,000 because every \$500.00 in the \$25,000 mortgage, \$50,000 was the multiple of that amount, and at that time when that was consummated, then my interest became three-fiftieths instead of 1/19ths.

Q. You misunderstand me. You were to have a 1/19th interest? A. That was the first interest.

Q. In what property? I want to get what definite properties, properties of whom?

A. All the properties carried on the books of the company at a value of \$787,000, I believe, of the Nome Consolidated Dredging Company's properties.

Q. What company? I want to get a definite idea, I want to get it into the record.

A. I have already stated it.

Q. What company? [67]

A. The Nome Consolidated Dredging Company.

Q. Any other company?

A. Whatever interest Mr. Powell had that was going into that company. He owned No. 8, No. 9 and No. 10 Dry Creek which was to go into the company.

(Deposition of George D. Schofield.)

He owned some ground east of town which was to go into this new company, the Nome Holding Company and all stock was to be issued to Mr. Powell except three shares to the holders who organized the corporation in Seattle. My interest in the \$25,000 mortgage represented 3/50ths of that corporation and that was to be my interest.

Q. Was the property of any other company outside the Nome Consolidated Dredging Company and Mr. Powell's personal holdings you spoke of, to go into this company, the Nome Holding Company, under this arrangement?

A. It certainly was, if we could get it through.

Q. What other properties?

A. The Anvil Hydraulic & Drainage Company, the Nome Mining Company properties.

Q. Any others?

A. The Wonder Dredging Company, that went in with its dredge and also included all the preferred and common stock of the Wonder Dredging Company. I was one of the stockholders of the preferred and common stock of the Wonder Dredging Company which was to go into this deal.

Q. Was any memorandum of this alleged agreement you have detailed, made in writing?

A. Not so far as Mr. Powell was concerned, not with him. He never would go in writing.

Q. Was any memorandum of it made in writing whatever by you?

A. There was a memorandum made, which was to be signed by certain [68] Eastern stockholders.

(Deposition of George D. Schofield.)

Mr. Powell signed it, and it was a formulated plan, a plan that was formulated for the entire reorganization. I asked him to produce it on the taking of his deposition and he stated he sent it to Seattle. I have no copy of it.

Q. Do you remember the terms of it?

A. I do not except that Mr. Powell was to receive 25% in lieu of his interest that he now holds, and 15% that he could dispose of as he pleased. He held 40%. I was supposed to be taken care of out of that 40% with my deal with Mr. Powell.

Q. Prior to the formulation of this agreement which you say you were to receive a 1/19th interest in a contemplated company, did you have any other agreement that Mr. Powell?

A. Only the original agreement that Mr. Powell would,—that we would go on and work together and formulate this scheme and get these properties into one, big, solid corporation and I was to have my proportion in it; and then, again, of course, I had my agreement that he was to pay me a reasonable compensation for my services in the first instance, when I went to work, but it afterwards developed into this interest in the properties and in this new big com-interest in the properties and in this new big com-terest.

Q. How was this company which you contemplated and in which you were to have a 1/19th interest, to acquire the properties, how did you contemplate you were to acquire it?



(Deposition of George D. Schofield.)

A. Under a mortgage foreclosure of \$225,000.

Q. How did you contemplate that it should be acquired at the time you made the agreement in the fall of 1914?

A. Contemplated foreclosing them under these mortgages, one mortgage for \$25,000 and another mortgage for \$200,000, to [69] protect the \$25,000 mortgage to cut out all bidders that would come on to the ground and bid over \$25,000 so we could use the \$200,000 for that purpose which was held by Mr. Powell by his notes personally, as a protection.

Q. How many of the notes under the \$25,000 mortgage did you have, did you receive?

A. I was to receive seven notes.

Q. I didn't ask you how many you were to receive, I asked you how many you did receive?

A. I received three, and gave up four to take care of the Associated Oil Company's claims.

Q. These notes, when received by you were credited on account of moneys that was owing you on account of the Nome Consolidated Dredging Company and other companies, were they not, for attorneys' fees?

A. They were credited on my account, certainly, because I was to have my money back with interest.

Q. They were given you in payment for legal services?

A. Yes, sir; for the Nome Consolidated Dredging Company.

Q. And any other companies?

A. The Nome Consolidated Dredging Company,

(Deposition of George D. Schofield.)

the work I had done for that company and allied companies.

Q. Under an express agreement?

A. Certainly, under a letter, an express contract.

Q. And so you drew up the mortgage for \$25,000. Is that a fact, Mr. Schofield?

A. I formulated that first mortgage. I formulated both mortgages, yes, sir; I devised the plan originally. It was my individual plan and submitted to Mr. Powell's counsel in Philadelphia.

Q. When was that that you submitted it to Mr. Powell's counsel [70] in Philadelphia.

A. I said Mr. Powell submitted it. He told me he did. I think that was devised first in the fall of 1913, but Mr. Powell was unable to get the Board of Directors that winter to put the thing through, but the next winter he was able to do it.

Q. When did you first conceive the idea of formulating this mortgage for \$25,000?

A. That amount was fixed at \$25,000 because of certain obligations the Nome Consolidated Dredging Company owed to the Alaska Bank. I wanted that mortgage for \$30,000 to cover certain little around-town items, but afterwards it had to be arranged in another way, namely, by the taking of four of my notes to fix up the Associated Oil Company's account.

Q. Do you remember the occasion last fall of Mr. Powell receiving from Philadelphia a mortgage already drawn purporting to be a first mortgage in the sum of \$200,000? A. Yes, sir.

Q. Did you draw that mortgage?

(Deposition of George D. Schofield.)

A. I formulated that mortgage in the first instance in 1913, Powell and myself together in Nome. It was taken out by him that year.

Q. Did you draw out a form of it?

A. It was drafted in 1913, yes, sir.

Q. What did you do with the draft you made?

A. I gave it to Mr. Powell to take east with him.

Q. Was it typewritten? A. I think it was.

Q. Did you dictate it to anybody?

A. I drew it myself on the typewriter, like I did many and many a form for Mr. Powell.

Q. Did you retain a copy of it? [71]

Q. I don't think I have a copy of it, Mr. Orton; I haven't been able to find any.

Q. That was in the fall of 1913 that you drafted and delivered to him a form of a mortgage for \$200,000?

A. I wouldn't say as to the amount. I don't think any amount was fixed in it.

Q. You remember then the occasion of when this mortgage was received here already executed?

A. I do recall a mortgage being sent back here.

Q. Was that in the same form as the one you drafted?

A. I would not say as to that.

Q. Was it substantially in the same form?

A. I would say it was on one phase of the thing. As I recall the mortgage was, we could bid the properties in, not for cash, but with the notes of the mortgage, that was the scheme all the way through, the plan I formulated and devised.

(Deposition of George D. Schofield.)

Q. Now, after the \$200,000 mortgage arrived here and was executed, what happened then?

A. Well, when the \$200,000 mortgage arrived here, Mr. Thatcher and Mr. Orton, the examiner of this examination, made some objections to the mortgage and insisted on having an individual mortgage to secure their indebtedness; they objected to the mortgage going of record, and the matter was taken up and discussed from time to time and we finally agreed upon a plan that we would issue a \$25,000 mortgage first to the Alaska Bank if they would loan to the Nome Consolidated Dredging Company a little more ready money that they needed in their business, and they accepted that \$25,000 in which they advanced something between ten and twelve thousand dollars.

Q. Now, it was contemplated, of course, at the time these mortgages were executed, that they would have to be shortly [72] foreclosed, of course, wasn't it?

A. Yes, arrangements were made before I left in the fall of 1914. I was to wire in to have Judge Reed foreclose these mortgages during the winter, and later on advices were received by Mr. Powell not to foreclose them until we came in in the spring.

Q. In the fall you had supposed that it might be necessary to foreclose them in the winter, before you came in?

A. Yes, sir; for our own benefit in following out our plan of closing this property out and getting it into one company.

Q. This property hasn't yet been collected into one company, has it?



(Deposition of George D. Schofield.)

A. The Nome Holding Company has been organized I don't know whether Mr. Powell has conveyed the properties yet or not.

Q. He would not be in a position at the present time to comply with your agreement, would he?

A. That is a question of law, I think he would. When it came to sell, Mr. Powell, when he wanted my notes of the Nome Consolidated Dredging Company to turn over to the Associated Oil Company in the fall of 1914 he represented to me, he said "\$1500.00 of this mortgage of \$25,000 is ample security for your interest, and when we come to bid on that, you are protected, you don't need any security for your outstanding interest, you are protected for \$1500." But when it came to the sale I was cut out; he bid it in personally and refused to bid it in as trustee, but bid it all in in his own name. He went up to the courthouse and bid it in for cash, paid \$1500.00 over to the marshal for me, and cut me out of my interest.

Q. These notes that were given for this \$25,000 mortgage, were all given for *bona fide* debts of the Nome Consolidated Dredging [73] Company?

A. I believe they were.

Q. And the same is true of the \$200,000 mortgage?

A. I don't know anything about that.

Q. You were familiar with the business of the company, for a great many years?      A. I think so.

Q. And you have no reason to believe that this \$200,000 in notes were fictitious, have you?

A. I decline to answer that under this examination on account of conversations had with Mr. Powell him-

(Deposition of George D. Schofield.)

self over that matter. It is a matter of privilege between counsel and client.

Mr. GILMORE.—I would like to instruct my client to answer.

Mr. SCHOFIELD.—I decline to answer.

Q. Mr. Powell and the other directors of the Nome Consolidated Dredging Co. who executed this \$200,000 mortgage were acting under your advice, were they not?

A. It was originally executed in the east, but we received a telegram if it was not satisfactory to yourself and the bank here, why he should,—we had to have cash at that time to carry on business, and I advised Mr. Powell, after consultation with yourself as attorney for the bank, to wire to the board for authority to execute a new mortgage as agent, and they wired in authority and it was finally executed by Mr. Powell for the company.

Q. And the amount was simply increased to \$225,000 by giving a first mortgage for \$25,000?

A. There was a mortgage for \$25,000 and one for \$200,000.

Q. And the original mortgage as formulated was \$200,000?

A. I think so; I would not be sure as to that first mortgage [74] but that is my impression that it was.

Q. Well, did the company execute the \$200,000 mortgage acting under your advice or not?

A. In accordance with the general plan formu-

(Deposition of George D. Schofield.)

lated, certainly, certainly it was, for the purpose which I have stated.

Q. Now, the plan, as I understand it, Mr. Schofield, was for the purpose of executing these large series of notes so that the same could be used for the bidding in of the properties of the company at the foreclosure sale, without the necessity of paying cash. Am I correct in that assumption?

A. No, it was made for a double purpose.

Mr. GILMORE.—I object to that question as leading.

Mr. COCHRAN.—Certainly it is leading. It has a right to be.

Q. State the double purpose please.

A. We desired the \$200,000 mortgage to protect our bidding on the \$25,000 mortgage. If anyone came in and bid \$50,000 for the property then the mortgages were so drawn we could use \$50,000 in notes of the second mortgage and bid. If they bid \$100,000, we could use \$100,000. In other words, we were able to bid, if we had to, up to \$225,000 plus the interest on the mortgages which we held.

Q. By "we" who do you mean?

A. Well Mr. Powell and myself.

Q. Anybody else?

A. Not at the time of the sale.

Q. Well, I mean at the time the mortgage was executed who do you mean by "we"?

A. Mr. Powell and myself. He represented to me that he represented all of the other interests and would be able to secure the endorsements of all the

(Deposition of George D. Schofield.)

other people and bid it in in [75] his own name which he afterwards did so at the sale he represented 47/50ths and I represented 3/50ths of whatever was done.

Q. Now, at the time you entered into this agreement with Mr. Powell in the fall of 1914, you definitely agreed with him that you would accept this interest in lieu of and as full compensation for all the services you performed for him, personally and otherwise?

A. There was nothing stated about that at all. That was to be my interest in this deal.

Q. What services were you rendering for that interest, the services referred to in this complaint?

A. Certainly.

Q. Those are the services you were to get a 1/19ths interest, as I understand it?

A. I have already stated I was to receive my money back I had in the company, my money in the Wonder stock representing at that time \$5,000.

Q. You were to receive what money back?

A. Receive my money I had invested in this deal.

Q. This included your attorney's fee?

A. Included attorney's fees and included my Wonder stock in the Wonder Dredging Company and it included \$2,000 that had been advanced by Mrs. Schofield to take up the time checks of the Nome Consolidated Dredging Company and keep the thing upon its feet when the company could not get money to pay them with.

Q. And you were to receive that all back?



(Deposition of George D. Schofield.)

A. Yes, sir, in cash, with interest at one per cent.

Q. And you were also to receive 1/19ths interest for those services? [76]

A. That was the first agreement, but it afterwards resolved itself down to my three-fiftieths interest represented by \$1500 in the first mortgage of \$25,000.

Q. That is, the agreement for 1/19ths interest was modified, or changed to a 3/50ths interest, is that it?

A. Yes, sir.

Q. When was that modification made?

A. That was made when Mr. Powell came to me and told me he would not be able to deliver to me the notes in the \$25,000 mortgage and requested that I permit him to use these notes to satisfy the claims of the Associated Oil Company when they had commenced suit and attached the dredges and cleanups, and the notes, instead of being delivered to me were turned over, some of them, to the attorney for the Associated Oil Company. There were seven notes for \$500 each, \$3,500.00, I got three of them.

Q. Was anybody ever present when this agreement was made between yourself and Mr. Powell or discussed?

Mr. GILMORE.—Which agreement?

Q. The one for the 1/19th interest of the 3/50th interest?

A. I don't recall there was. I never transacted any business in his office until I started to foreclose these two mortgages and drafting the papers. Before that he always came to my office.

(Deposition of George D. Schofield.)

Q. I say, was anybody present?

A. I say I don't recall anybody.

Q. You don't recall that you and he ever discussed the matter in the presence of anybody?

A. I don't recall it. We may have, I wouldn't say we did not. We might have discussed it in front of Judge Murane in Seattle, or we might have discussed it in front of A. J. [77] Jarmuth, I wouldn't be sure. When we formed the Standard Hydro-Amalgamator Company for Mr. Powell and Mr. Jarmuth in Seattle this spring.

Q. Was the formation of this company a part of the services included in this?

A. It isn't mentioned there except general advice given to Mr. Powell in private matters.

Q. Did that include the formation of that particular company?

A. It includes everything I have ever done for Mr. Powell personally.

Q. I am not asking particularly if that was a part of it.

A. It might be an element in the deal.

Q. Was it or was it not part of the legal services for which you sue?

A. I had not thought of it at the time I brought that suit. I gave Mr. Powell lots of advice—

Q. You didn't include that?

A. I did not.

Q. Didn't Mr. Jarmuth pay you for that in cash?

A. Mr. Jarmuth paid me for drafting the Articles of Incorporation.

(Deposition of George D. Schofield.)

Q. That included full payment for services in the matter of organizing the company?

A. So far as the drafting of the Articles of Incorporation was concerned but he didn't pay me anything for my private advice to Mr. Powell in connection with it.

Q. How long do you expect to remain here, Mr Schofield?

A. Why, until you get through with this examination.

Q. I mean in Nome.

A. I expect to be here until the boat sails.

Q. You mean the last boat? [78]

A. It all depends entirely on my state of health. If I can I won't go out until the last sailing, it all depends on business and parties who are coming in on the "Victoria."

Mr. ORTON.—That is all.

Cross-examination.

Q. (By Mr. GILMORE.) Mr. Schofield, after you entered into the agreement you have detailed with Mr. Powell in the fall of 1909, to perform services for their reasonable value, did you, subsequent to that time, and up to the time you brought this suit, perform services for him?      A. I certainly did.

Q. And filed a complaint here with an exhibit attached to it marked Exhibit "A," detailing certain services set forth in the complaint and attached to that complaint?

Mr. ORTON.—Objected to as immaterial.

(Deposition of George D. Schofield.)

Q. Did you perform the services therein detailed, to Mr. Powell, the defendant in this case?

Mr. COCHRAN.—That is objected to as irrelevant, incompetent and immaterial.

A. I did perform those services for Mr. Powell, certainly.

Q. And in the fall of 1914, I believe you stated, Mr. Powell fixed the reasonable value of your services performed by you for 1909 up to that time including what you then had contemplated in finishing up, to be a 1/19th interest in the reorganization plan that he had on foot?      A. Yes, sir.

Mr. ORTON.—Objected to as leading.

Mr. GILMORE.—It certainly is, intentionally so.

Q. This is in substance what you told Mr. Orton in your direct [79] examination?

Mr. ORTON.—Objected to as leading.

A. Yes, sir.

Q. Now, at that time will you please state what that 1/19th interest was to be given you by Mr. Powell for, what it included in its entirety, providing he gave it to you?

A. That included my personal work for Mr. Powell from the date of my employment in 1909.

Q. And I believe you also stated that you were to have your money back?

A. I was to have my money back I had in the deal, which at that time he figured was \$5,000, with interest at 1% per month.

Q. In 1914 and at that time what did he state to you and what did he assume the properties that he



(Deposition of George D. Schofield.)

was listing to be valued at?

A. \$800,000.

Q. And have you figured out what 1/19th of that is worth?      A. I have not.

Q. Approximately what would it be worth, would it be worth forty or fifty thousand dollars?

A. At the time that Mr. Powell talked to me, for my \$5,000 I was to have nineteen dollars for one, which would be \$95,000, that is what it would be.

Q. Before you brought this suit against Mr. Powell for the reasonable value of the services detailed and performed by you, did you make a demand on him for the interest that he had promised and stated he would give you?      A. I certainly did.

Q. What did he say?

A. He said I didn't have any interest.

Q. Did you hear his deposition taken the other day in my office?      [80]

A. Yes, sir.

Q. State whether or not you heard him state you hadn't a thing coming and that he had not promised you anything.      A. I did.

Q. When he refused to give you the 3/50ths interest he had promised you, what further steps, if any, did you take to obtain payment for your employment?

A. I commenced this action against him for \$30,000 which I consider to be the reasonable value of my services.

Q. You are familiar with charges made for services performed similar to these, in Nome, aren't you?      A. I am.

(Deposition of George D. Schofield.)

Q. How long have you practiced in the Nome district?     A. Since 1900.

Q. Are you familiar with charges of attorneys for similar services?     A. I am.

Q. State whether or not the sum of \$30,000 is a reasonable attorney's fee for the services performed by you during the last few years for Mr. Powell?

A. It certainly is for the services I have performed for Mr. Powell.

Q. Has he paid you any part of it?

A. He has not, not a cent of it.

Q. If Mr. Powell had given you the 3/50ths interest or something in writing to show your 3/50ths interest would you have brought this suit?

A. I would not.

Q. Did you make demand of him for payment, the way he promised he would pay you?

A. Yes. I demanded it in the marshal's office and demanded it in [81] his office and he had the nerve after all these years' work I done for him, to turn me down.

Q. Now, Mr. Orton asked you about the execution and carrying out of this plan of \$200,000 in notes. Who perfected that plan and outlined it for Mr. Powell?     A. I did personally.

Q. Do you know of your own knowledge, Mr. Schofield, whether or not those \$200,000 worth of notes known as the notes embraced in the Darling mortgage, were ever actually delivered to the payees?

A. I know nothing about it.

Q. As a matter of fact, that was a fictitious mort-

(Deposition of George D. Schofield.)

gage, was it not, devised for the purpose of preventing legitimate bidders at the sale of the Thatcher mortgage?      A. I decline to answer.

Q. On what ground?

A. As counsel for Mr. Powell in that whole matter. I don't think it is material to this examination.

Mr. COCHRAN.—You can state as far as we are concerned. We throw down the bars, so answer it.

Mr. SCHOFIELD.—You have my answer, gentlemen.

Q. They have waived their privilege and you can answer it.      A. I don't care to at this time.

Q. Did you or did you not discuss with Mr. Powell on many occasions while you were formulating this plan, the intention to freeze out all of the stockholders of the Wonder Dredging Company, the Nome Mining Company, the Nome Consolidated Dredging Company and kindred companies?

A. Not wholly.

Q. State whether or not it was the intention to freeze out a large proportion of them unless they would come in under [82] certain terms that Mr. Powell would dictate to them in the new holding company?

A. They were to be eliminated from the ownership of stock in the new company unless they did certain things.

Q. You stated there were two reasons for floating this new mortgage. What was the third reason, to

(Deposition of George D. Schofield.)

eliminate certain stockholders who were obnoxious to Mr. Powell?

A. You will have to divide your question. I don't know what Mr. Powell's relations were with the eastern stockholders.

Q. I am asking you whether or not Mr. Powell stated this to you at the time you were formulating this plan for him, he desired to eliminate certain stockholders?

A. The stockholders who would not come through into the new corporation under certain conditions were to be absolutely eliminated.

Mr. COCHRAN.—That was in accordance with the plan you had developed?

Mr. SCHOFIELD.—That was Mr. Powell's plan.

Q. Mr. Schofield, I particularly direct your attention to one suit you claim you filed and conducted for Mr. Powell individually, Sloan versus Smith, being a suit in connection with Dredge 3 on the Carnation claim out here on Flat Creek, I believe it is, or Wonder. I will ask you to state whether or not you heard Mr. Powell's testimony with reference to this suit the other day when his deposition was taken? A. I did.

Q. Wherein he stated you were employed solely in that case by Dr. Sloan for the Alaska Dredging Company?

A. That is the first time I ever heard it.

Q. Was it true or not?

A. I was employed by Mr. Powell in that suit; that was a part [83] of the scheme to get claim and



(Deposition of George D. Schofield.)

title of that dredge in his name to carry out our plans.

Q. Did Mr. Powell ever, at any time, claim you were working for the Alaska Dredging Company in that lawsuit?      A. No, sir.

Q. For whom did you perform the services in that case?

A. Performed them at Mr. Powell's request.

Q. And what was the result of that lawsuit?

A. The result was the acquiring of title to dredge No. 3 carried on the books of the company for something like \$90,000 for less than \$4,000.

Q. In whose name does it stand?

A. In Mr. Powell's.

Q. The defendant in this case?

A. Yes, sir. Also the purchasing of two notes of the Nome Consolidated Dredging Company for \$5,000 each, and the purchasing of the property of the Sesnon Company that stood in the name of Ed. L. Smith, which I left last fall, prior to the sale, which matter I left in the hands of O. D. Cochran, one of the attorneys for the defendant in this case. He forwarded the notes and bill of sale of the dredge to Seattle and I personally handed it to Frank S. Powell, E. E. Powell was not in Seattle at that time and F. S. Powell, his secretary, received it.

Q. Now, before you brought this suit for your attorney fees for the reasonable value of your services, state whether or not Mr. Powell discharged you?

A. He discharged me from the companies and also

(Deposition of George D. Schofield.)

from his personal employment. You have that letter with you.

Q. That letter of discharge was in the form of a letter?

A. It is in the form of a letter, yes, sir. [84]

Q. State whether or not through your attorney you made a demand from Mr. Powell for the amount of the services you are suing for?

A. Yes, sir; I did and furnished him with an itemized account as set forth in the exhibit.

Q. You made that demand? A. Yes, sir.

Mr. GILMORE.—That is all.

Redirect Examination.

Q. (By Mr. ORTON.) You left a bill at his office contemporaneously with the filing of this complaint?

A. Yes, sir.

Q. You don't know whether he received that before filing the complaint or not?

A. I wasn't present. My attorney, my attorney presented it.

Q. The same afternoon you filed the complaint?

A. I don't know, I didn't present that personally, my attorney attended to it.

Q. You don't know because you didn't do it yourself? A. That is it.

Q. In reference to this suit that was brought in the name of Sloan. You knew the Alaska Dredging Company's money took up that note, didn't you?

A. No, I did not.

Q. You didn't know that? A. No, sir.

(Deposition of George D. Schofield.)

Q. You didn't know anything about whose money it was?      A. I did not.

Q. You were attorney for the Alaska Dredging Company at that time, weren't you? [85]

A. Whatever work Mr. Powell turned over to me to do for the Alaska Dredging Company I have always done.

Q. You had a contract by which you were to be the general counsel?      A. Yes, sir.

Q. That extended during all these years from 1909 down to the present year?

A. Down to the time I was discharged by Mr. Powell's written letter.

Q. And the same may be said of the Nome Consolidated Dredging Company after it was incorporated, and also the Anvil Hydraulic & Dredging Company, and also the Wonder Dredging Company?

A. Yes, sir.

Mr. ORTON.—That is all.

D. B. CHACE.

Subscribed and sworn to before me this 21st day of August, 1917.

[Seal]

J. F. HOBBS,  
Notary Public for the Territory of Alaska, Residing  
at Nome.

(My commission expires May 16, 1920.)

Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome, Aug. 22, 1917.  
G. A. Adams, Clerk.

Plaintiff then offered in evidence the deposition of defendant E. E. Powell taken in the above-entitled

(Deposition of E. E. Powell.)

cause before D. B. Chace, a notary public, on the 5th day of September, 1917, at Nome, Alaska, and said deposition was read and received in evidence, being in substance in words and figures as follows:

**Deposition of E. E. Powell.**

(Title of Court and Cause.) [86]

(Witness examined by Mr. GILMORE:)

Q. Mr. Powell, you are one of the defendants in this case?     A. I am.

(Witness continuing:) I have read the plaintiff's complaint and I know the property that is mentioned and included in the complaint—the list of assets, personal and real, described in the decree as set forth and annexed to the complaint. I bid that property in at the United States marshal's sale in the Thatcher trustee case in 1915, and thereafter I held it in trust as trustee during that summer up until some time in October when I transferred it to the Nome Holding Company. I was holding it in trust for the bondholders, the people whose notes, whose bonds I held on the mortgage. They were Mr. Beckman, the Alaska Dredging Company, Mr. Eisenlohr, M. W. Newton, Mr. McCoy, J. M. Sloan, Mr. Cunningham, E. E. Powell, Lewis Bremmer and E. L. Webster; I guess that is all, I don't remember whether there were any others or not, there might have been some small interests. I have not a list of all of those who had interests, with me. At or about the time that I transferred said property to the Nome Holding Company the said Nome Holding Company



(Deposition of E. E. Powell.)

executed a mortgage to me as trustee. While I was acting as trustee after the sale, after I purchased the property, and up until the time I conveyed to the Nome Holding Company, I was acting as trustee for Mr. L. H. McCoy, Mr. Cunningham, Mr. Webster and Mr. Newton, all of whom have made affidavits in this case. I was also acting for Louis H. Eisenlohr. I don't believe that he made an affidavit.

The amount of the mortgage that the Nome Holding Company gave to me at or about the time I transferred said property to it was \$200,000.00. The mortgage was recorded by me in the Cape Nome Recording District, and is a lien on all of the property that I conveyed to the Nome Holding Company. The mortgage still remains unsatisfied of record. It was given to me as trustee for some of these parties who trusted their securities to me to foreclose. Some of the ones I have mentioned.

Q. State to the Court the names of the parties that you are trustee for under that two hundred thousand dollar mortgage that still remains unsatisfied, giving all of the names as near as you can?

A. Louis Bremer. The amount due him of the two hundred thousand dollars, approximately I would say is twenty-five or thirty thousand dollars. M. W. Newton has probably forty or fifty thousand, maybe a little over that, maybe fifty-five thousand. L. H. Eisenlohr probably, I think about sixty-five thousand, somewhere around sixty thousand dollars; the Alaska Dredging [87] Company

(Deposition of E. E. Powell.)

probably forty-five or fifty thousand dollars, about forty-five thousand dollars.

Q. Name another person for whom you are trustee under that mortgage.

A. Well, there is myself, and J. E. Powell. For myself approximately thirty thousand dollars which I won't get, I don't get that much. Well say, twenty-six thousand dollars anyway, I don't know the exact amount, that is as near as I can state it. I would say nearly thirty thousand; it may be a little over that. J. E. Powell, about, pretty near five thousand dollars I guess. F. S. Powell, also my brother, about three thousand dollars.

Q. Name another.

A. E. L. Webster. He has about two thousand dollars with interest due him, I don't know just exactly.

Q. Name another.

A. Mr. Cunningham; he has about eleven or twelve thousand dollars I should judge; I think he had eleven thousand dollars' worth of securities and interest. It would be \$11,500 more or less, I expect.

Q. Now, name some other person you were trustee for under that mortgage, if there are any?

A. Well, I just don't remember. Mr. Beckman has about thirty-two or thirty-three thousand dollars that I represent, that is one hundred cents on the dollar, to pay his claim.

Q. Now name another? Anybody else?

A. No, sir, I don't think of any more, but as represented in that mortgage some of these are one

(Deposition of E. E. Powell.)

hundred cents on the dollar and some own a percentage.

(Witness continuing:) Mr. McCoy is not one of them under the mortgage, he is eliminated and has not been paid but will be. He has notes allotted to him but I think they are not to be considered, [88] I think he is to be paid off one hundred cents on the dollar for his.

There is no agreement in existence between me and these different persons whom I represent showing the trusteeship on my part except there is a letter from me to these different gentlemen, or some of them. The letter shows that this mortgage is being held for their benefit so that if anything should happen to me it would show that the mortgage is held for the benefit of these different gentlemen.

Q. Now, Mr. Newton, Mr. Eisenlohr, yourself, E. L. Webster and Mr. Cunningham were all creditors, were all note holders under the Thatcher mortgage, were they not?      A. Yes, sir, they were.

(Witness continuing:) This two hundred thousand dollar mortgage executed for the Nome Holding Company was executed at Seattle before I parted with my title, but my recollection is we deeded it to the Nome Holding Company and handed the deeds to them before the mortgage was made. The Nome Holding Company is a Washington corporation, organized under the laws of the State of Washington, with a capital of fifty thousand shares. I don't remember when the company was organized but along in the fall of 1915 shortly after I bid this prop-

(Deposition of E. E. Powell.)

erty in at the marshal's sale.

Q. Now, what amount of the stock of the Nome Holding Company do you own, Mr. Powell?

A. Well, I don't exactly know what amount I do own. I have a number of settlements to make.

(Witness continuing:) I should think that I would probably hold between one-fifth and one-fourth of the entire fifty thousand shares. I have settlements to make with a number of my associates and I don't know really where I am coming out on that yet.

Q. How much of the stock of the Nome Holding Company, Mr. Powell, was issued to you irrespective of whether you own it or someone else owns it?

A. All of it except three or four shares.

(Witness continuing:) One share was issued to George W. Dutton; one share to F. S. Powell, my brother. I am not sure that it was just one share, it may be two shares; and another share, a nominal [89] amount, was issued to J. D. Trenholme. These three were the incorporators and subscribed to the stock.

Q. And they incorporated the Nome Holding Company, electing your brother, President, J. D. Trenholme, Secretary and George W. Dutton, Director; the three of them?

A. I don't know whether that is correct or not.

(Witness continuing:) The Articles of Incorporation are on record and they will show who was President and Secretary—I don't remember. My brother, F. S. Powell, was interested in the Alaska Dredging Company as a stockholder. He is inter-



(Deposition of E. E. Powell.)

ested with me as a stockholder in the Nome Holding Company. He works on a salary.

Q. And Mr. Dutton was an employee of some of your companies, was he not?

A. He worked for us for two years,—a portion of the time for two years.

(Witness continuing:) He was in Nome for one summer as an employee in our office here. He was not an employee of our companies in Seattle.

Q. Now, all of the stock, then, except the nominal shares that were issued to these three directors, or incorporators, were issued on the stock book to you, E. E. Powell, by the Nome Holding Company?

A. Yes, that was all issued to me for value.

Q. And have you parted with any part of that stock to anybody by assignment, or otherwise, on the books?      A. Yes, sir.

(Witness continuing:) Offhand, I should say somewhere near four or five thousand shares to Mr. Newton; and four or five thousand shares to Louis H. Eisenlohr; about seven thousand shares to Theron I. Crane of Philadelphia. He may have some smaller interest in addition. I assigned about three thousand shares to E. L. Webster as near as I can state. I did not give any of the Nome Holding Company capital stock to Mr. Gayley, or to Mr. Henry B. Livingston, or to Mr. August Heckscher.

Q. Now, you have told me of approximately 19,000 or 20,000 shares out of the 50,000 shares. To whom, if any other persons, did [90] you issue or assign any of the other 30,000 shares?

(Deposition of E. E. Powell.)

A. Well, there are several. There is quite a list of people there.

Q. You have assigned about 3,500 shares to a number of the Nome Mining Company shareholders or stockholders, did you not? A. Yes, sir.

(Witness continuing:) They have been buying the mortgage up against the Nome Mining Company.

Mr. Lawrence Darr of New York was the trustee of the stockholders. He was a son of George W. Darr the president of the Nome Mining Company at the time that the mortgage was given.

Q. Did you, or did you not, Mr. Powell, issue, or cause to be issued, any of the capital stock of the Nome Holding Company to shareholders of the Nome Mining Company for any purpose whatever?

A. No, sir, they were purchasing their preferred stock. I think I issued perhaps 8,000 shares. There was quite a list of people. Well, I think it was three or four thousand shares. I issued them to Mr. Reed the secretary of the Alaska Mines Corporation. Approximately I should say about 3,500 shares. I stated that there were 8,000 shares. The total amount that was given to Mr. Reed is about 3,500 instead of 8,000 shares that were issued. I am giving it all to him, and he is issuing it to different people. I think I am mistaken about the eight thousand shares. He has about that amount of stock in his possession.

Q. And the truth is there were about 3,500 shares issued to them but the stock was issued to Mr. Reed for delivery?

(Deposition of E. E. Powell.)

A. Yes, and he has perhaps delivered two-thirds of that, or half of it already.

(Witness continuing:) That would be thirty-five hundred shares instead of eight [91] thousand shares, I think that is somewheres near right.

Q. That would make about 25,000 shares or half of the stock. Now, those other 25,000 shares stand in your name at the present time, do they?

A. At the present time I don't think there is that much.

(Witness continuing:) I should say there is some 20,000 shares in my name, about 40 per cent of the capital stock. Some of it is under contract to be delivered and some of it is not.

The present Board of Directors of the Nome Holding Company are the same: F. S. Powell, J. D. Trenholme and George W. Dutton. I do not hold any office in the Nome Holding Company.

Q. You were given a general power of attorney were you not, in 1915?

A. Yes, sir, I was. I don't know whether that is revoked or not, but I don't think it is revoked.

(Witness continuing:) As far as I know, the general power of attorney is still in force. Under that power of attorney I was given authority to handle the property. I was given about the same authority that I had under my former company as general manager.

As far as I know I am the general manager of the Nome Holding Company at the present time. The three directors, J. D. Trenholme, F. S. Powell, and

(Deposition of E. E. Powell.)

Geo. W. Dutton are only nominal stockholders and only own a small amount of stock, one or a very few shares each.

Q. Mr. T. I. Crane, Mr. Newton, Mr. Eisenlohr and yourself own a majority of the stock of the Nome Holding Company?

A. I think that we would, I am not sure of that.

(Witness continuing:) There is no agreement, oral or in writing, existing between Mr. Crane, Mr. Newton, Mr. Eisenlohr or myself with reference to voting or controlling all of the stock of the Nome Holding Company.

Q. Who organized the Alaska Mines Corporation?

A. Mr. Menken, Mr. Driscomb and Mr. Beekman.

(Witness continuing:) I don't know of W. A. Strata, F. S. Bolen or W. B. Hunting. I never heard their names before. [92]

Q. Now, the original articles of incorporation that were filed at Richmond, Virginia, gave them as the Board of Directors of the Alaska Mines Corporation?

A. That is perhaps true, I don't know.

(Witness continuing:) I don't know any of those gentlemen. I have no idea if there are any such gentlemen in existence. I don't know as a matter of fact whether they are dummy names or not. No one ever told me so—I never questioned it.

Q. Now, did you know that the Alaska Mines Corporation was going to be organized before the 9th day of June, 1916? A. Yes, sir.

Q. Who told you?



(Deposition of E. E. Powell.)

A. Why, Mr. Crane, I had a talk with him several times about organizing a company.

Q. After you transferred this property to the Nome Holding Company and got a mortgage back, you went to New York and Philadelphia that fall, didn't you?      A. Yes, sir.

Q. And you went back there for the purpose of organizing a new company to exploit these properties?

A. Yes, I went back to see what I could do and we finally got down to a place where they wanted me to sell their property for them if I could.

Q. You went to Mr. Gayley to get him to organize a company to exploit this property?

A. I went to him after a while; I went to several gentlemen.

Q. And as a result of numerous negotiations with Mr. Gayley the Alaska Mines Corporation was organized, was it not?      A. Yes, sir.

Q. At the time mentioned?      A. Yes, sir. [93]

(Witness continuing:) I don't know how soon after the 9th day of June Strata, Bolen and Hunting resigned as officers and directors. I don't know the date when the new directors were elected. I became a director of the Alaska Mines Corporation some time in June or July, 1916, the same year that the company was organized. I was elected a director in New York. Those present at the time I was elected were Mr. Gayley, Mr. Crane, August Heckscher, and I don't know who were directors at that time, I don't remember. I think that Mr. Newton was present

(Deposition of E. E. Powell.)

also, but Mr. Eisenlohr was not there.

Q. So that a new board was elected at that meeting consisting of seven directors, is that correct?

A. Yes, sir.

(Witness continuing:) I don't know whether it was at that meeting or not, but anyhow either at that meeting or the next meeting they increased their board to seven. We held several meetings in June and July after the organization of the company and at some of those meetings the seven men were elected; the seven directors being Mr. Gayley, Mr. Newton, Mr. Eisenlohr, Mr. Crane, Mr. Livingston, Mr. Heckscher and myself. The directors then proceeded to elect Mr. Gayley, president and Mr. Walter S. Reed secretary-treasurer.

Q. How soon after you qualified as a director did you open negotiations to sell the Nome Holding Company's property to the Alaska Mines Corporation?

A. I should think inside of a month.

Q. Isn't it a fact that the terms of the sale were already all arranged between you and Mr. Crane before the Alaska Mines Corporation was organized?

A. No, we had not got that far to talk detail.

Q. Hadn't you about concluded your negotiations?

A. No; there were two or three propositions up, any one of which we were willing to talk on.

Q. Who was present representing the Nome Holding Company in the negotiation?

A. I was representing the Nome Holding Company in the negotiation. [94]

(Deposition of E. E. Powell.)

(Witness continuing:) I don't know as I could define to you just my capacity but I was there trying my best to put a deal through with this company to make a deal, if I could.

Q. And at the time you were trying to put a deal through, you were the general manager and principal stockholder of the Nome Holding Company?

A. Yes, sir.

Q. Also a director of the Alaska Mines Corporation?      A. Yes, sir.

Q. At that time Mr. Newton, Mr. Eisenlohr and Mr. Crane were also directors of the Alaska Mines Corporation?      A. Yes, sir.

Q. Now, you consummated a deal sometime along in July or August, did you not?      A. Yes, sir.

(Witness continuing:) In substance I agreed to transfer from the Nome Holding Company to the Alaska Mines Corporation all of the assets, real and personal, of the Nome Holding Company, subject however, to the mortgages for the issuance and delivery of 3,701,820 shares of the capital stock of the Alaska Mines Corporation, and for that consideration the Nome Holding Company executed its deeds and bills of sale to the assets,—to all of its assets. The 3,701,820 shares of the capital stock of the Alaska Mines Corporation was then issued and delivered to the Nome Holding Company, and the Nome Holding Company now owns 3,701,820 shares of the capital stock of the defendant Alaska Mines Corporation. That stock was never divided and issued to the respective stockholders of the Nome

(Deposition of E. E. Powell.)

Holding Company. There is no understanding that each shareholder of the Nome Holding Company shall have eighty shares of the capital stock of the Alaska Mines Corporation. It is worth eighty shares, sure it is. That is, each share of the Nome Holding Company stock is worth eighty shares of Alaska Mines Corporation stock.

Q. Does a shareholder of the Nome Holding Company have anything in writing, or otherwise, to show he is also a stockholder in the Alaska Mines Corporation?      A. No, sir.

Q. Has he anything to show that he is entitled to eighty shares [95] of the Alaska Mines Corporation stock?

A. No, sir. No one has anything except stock of the Nome Holding Company.

Q. Is there any memorandum of agreement or writing of any kind or character between the Alaska Mines Corporation and the Nome Holding Company, to show who has the voting power of the 3,701,820 shares of the capital stock so delivered?

A. No, sir.

(Witness continuing:) There is no memorandum in writing between Mr. Eisenlohr, Mr. Newton, Mr. Crane and myself as to whom should have the voting power of the stock.

Q. Who has the voting power of the 3,701,820 shares?      A. Why, the Nome Holding Company.

Q. The general manager of the Nome Holding Company you are speaking of?

A. No, the rights have never been exercised.



(Deposition of E. E. Powell.)

Q. At your annual meeting of the Alaska Mines Corporation held in 1917, who represented the Nome Holding Company, the 3,701,820 shares?

A. We had no meeting.

Q. You have never had a meeting yet?

A. No, sir.

Q. Who will represent it when they meet?

A. I have no idea.

Q. If I were a stockholder holding one share of stock in the Nome Holding Company would I have any right to appear and vote at the Alaska Mines Corporation annual meeting of the stockholders?

A. I should think not.

Q. The voting power is lodged in the control of the Nome Holding Company?

A. I think that would be the way. [96]

Q. Would its officials or somebody designated by it, be permitted to?

A. I should imagine so, I don't know, the matter has never come up.

Q. That wasn't part of the plan, was it, to lodge the voting power in the officials rather than the stockholders?

A. No, we have had no plan of that kind.

Q. The Alaska Mines Corporation is incorporated for ten million shares at a dollar per share?

A. Yes, sir.

Q. And 3,701,820 shares were issued to the Nome Holding Company?      A. Yes, sir.

(Witness continuing:) I believe approximately that there have been about five million shares issued

(Deposition of E. E. Powell.)

all told. In my affidavit that I filed in this case I stated that about 600,000 additional shares have been issued in addition to the 3,701,820 shares given to the Nome Holding Company. I think that it is more than that. I think it is about five million but I am not sure of that. I would say four million and a half anyhow.

Q. Then there would be a little over a million shares additional to what the Nome Holding Company own?     A. Yes, sir.

(Witness continuing:) The balance of the stock is treasury stock.

Q. Then there are five million shares of the capital stock of the Alaska Mines Corporation still unissued and in the treasury?     A. Yes, sir.

(Witness continuing:) The same directors I named a while ago are still directors of the Alaska Mines Corporation. The seven that were named, there have been no changes since their election.

Mr. Theron I. Crane is a steel man of Philadelphia and New York. He was not interested financially in the Nome Consolidated Dredging Company, but he was interested as a stockholder and financially in the Nome Mining Company. He held some of the preferred stock of the Nome Mining Company. [97] He was a preferred stockholder of the Nome Mining Company, and the Nome Mining Company's preferred stockholders are also owners of Nome Holding Company stock. The 3,500 shares I mentioned are being used for buying that mortgage up, and Mr. Crane is to be one of those to receive stock.

(Deposition of E. E. Powell.)

I first met and got acquainted with Mr. Crane in the year 1906. I have talked with him many times since but I had nothing to do with him in connection with this property until 1916.

Q. And he was the principal financial incorporator, was he not, or organizer of the Alaska Mines Corporation?

A. He was the moving spirit up to the place of bringing in these people who came in with him.

Q. Who took the initiative of acting from there on?

A. I don't know as I am prepared to state. Mr. Crane was the man who got Mr. Gayley interested, also Mr. Reed and the others.

Q. When you foreclosed the Thatcher mortgage why didn't you make the Nome Mining Company party defendant?

A. Oh, I don't know a thing about why they didn't.

(Witness continuing:) The Nome Mining Company held a prior mortgage to the extent of \$100,000. I went ahead and foreclosed the Thatcher and Darling mortgages with an outstanding first mortgage of \$100,000 in favor of the Nome Mining Company on the property. I didn't make the Nome Mining Company a party. I intrusted that to my attorneys.

Q. Wasn't the purpose of it, and your attorneys agreed at that time you would not make the Nome Mining Company a party because it would delay the foreclosure proceedings?

A. I don't know anything about their reasons. I don't know that that was the case.

(Deposition of E. E. Powell.)

(Witness continuing:) I don't know whether we discussed that or not.

Q. Now, in volume 173 there is a mortgage of the Nome Mining Company to the Bankers Trust Company of New York made on December 21st, 1907, for fifty thousand dollars that remains unsatisfied of record. [98]

A. Yes, sir, I know what that is; yes, sir.

(Witness continuing:) It is a mortgage given by the company for \$50,000 before but now paid. I believe that it is still unsatisfied of record.

Q. And it is a lien against the property that was transferred to the Alaska Mines Corporation?

A. I don't know as to that.

(Witness continuing:) I don't know why I didn't make the Bankers Trust Company a party to the Thatcher foreclosure. I don't know whether it was to prevent delay of the trial over the summer of 1915 or not. I had completely forgotten the mortgage.

Q. Now, Mr. Powell, will you please tell the court all the mortgages that you know of that exists against the assets of the Alaska Mines Corporation to date?

A. One of \$100,000 to Lawrence Darr, trustee, for the Nome Mining Company, and one of \$200,000 to myself as trustee for the Nome Holding Company bondholders,—note holders.

Q. And the \$50,000 one to the Bankers Trust Company that I just mentioned?

A. That is not a mortgage any more, that has been paid off.

Q. Now, in addition to that the Alaska Mines Cor-



(Deposition of E. E. Powell.)

poration has given a mortgage to Mr. Greenberg for \$35,000, has it not?

A. That is on his own property.

Q. Well, it is on property claimed by them. Claimed by the Alaska Mines Corporation bought from Greenberg?      A. Yes, sir.

(Witness continuing:) I don't know of any other mortgages. This Lawrence Darr mortgage was for \$100,000. I think that about all of it is paid. I believe that all of it is paid at this time.

Q. Did you personally pay it?      A. No, sir.

Q. Who was going to pay it? [99]

A. Why, the stock as put up by the Nome Holding Company for the purpose of that mortgage and they paid it off.

Q. That is this 3,500 shares you left with Mr. Walter Reed?      A. Yes, sir.

(Witness continuing:) The stock itself went to the stockholders of the Nome Mining Company. They were taking stock in the Nome Holding Company for their interest in the mortgage. Colonel Weatherly was one of those. The stockholders will have a right to cancel the mortgage. It is not a fact that the stockholders of the Nome Holding Company control a majority of the stock of the Nome Mining Company. I don't know how much stock Mr. Gayley, the president of the Alaska Mines Corporation, owns. He is one of the owners of the 600,000 shares mentioned in my affidavit. He has stock but I don't know how much.

Q. As much as 100,000 shares in the corporation?

(Deposition of E. E. Powell.)

A. I don't know.

Q. He was just brought into the company because he was a big steel man, engaged in the steel manufacturing business, was he not?

A. No, he is one of the stockholders of the company and a principal in the matter in some way, but I don't know how much he has.

(Witness continuing:) He is not a nominal stockholder. I don't know how much stock he has but I do know he is one of the principals and when it comes to talking business he dictates the policy largely.

Q. He owns less than 600,000 shares of the ten million shares, is that a fact?

A. Yes, sir, that is a fact.

Q. Now, the Nome Consolidated Dredging Company quit business in the fall of 1914, did it not, Mr. Powell?     A. Yes, sir.

(Witness continuing:) The next year there wasn't any operations until after the foreclosure suits. After the foreclosure and after I bid the property in in 1915 I operated the property myself up till fall and then in 1916 the property was finally transferred to the Alaska Mines Corporation and since that time the [100] Alaska Mines Corporation has been preparing and getting ready to operate.

Q. And the Nome Consolidated Dredging Company went out of business and didn't continue in business after 1914?     A. No, after 1914.

(Witness continuing:) The Nome Consolidated Dredging Company did not operate during the winter of 1914 or did not do any mining operations

(Deposition of E. E. Powell.)

after the close of 1914.

Q. Now, in 1915 in the Thatcher, Darling foreclosure suits, all of the assets of the Nome Consolidated Dredging Company were included in that foreclosure, were they not, subject to that mortgage?

A. Yes, sir.

Q. And you bid in all of the assets?

A. Yes, sir.

Q. Has the Nome Consolidated Dredging Company any property anywhere that you know of?

A. It has not.

Q. And didn't have after that foreclosure?

A. No, sir.

Q. Either in Alaska or elsewhere?

A. No, sir.

Q. The Alaska Mines Corporation now has two dredges operating, hasn't it, at the present time?

A. Yes, sir.

(Witness continuing:) One on Bourbon Creek and one on Flat Creek, both mining under full swing, and using the power plant that was sold under the Thatcher foreclosure. The Alaska Mines Corporation is about to complete another dredge known as the Greenberg or Bessie Dredge on Holyoke Creek, and expects to operate that very soon. It is the same size as the other two dredges. It is the intention of the Alaska Mines Corporation to operate all three dredges and mine as rapidly as possible with them as soon as they can. They may not get to it this fall. It is the intention of the Alaska Mines Corporation to operate the remainder of this mining season with

(Deposition of E. E. Powell.)

these two dredges that are now working. [101]

Q. And the Alaska Mines Corporation intends to appropriate and take all the gold dust and gold extracted and keep it?     A. Yes, sir.

Q. And it doesn't recognize the Nome Consolidated Dredging Company as having any interest whatever in the output of the claims or the output of the dredges?     A. No, sir.

Q. Or the rentals of the power plant?

A. No, sir.

(Witness continuing:) Besides being a director of the Alaska Mines Corporation I have been delegated with special authority during the time I am up here to look after their affairs. I am on a salary of \$6,500.00 per year. It is an annual salary. I don't know what my title is. I am not sure whether I am on record as general manager of the Alaska Mines Corporation in Alaska or not.

Q. Well, you are, aren't you?

A. I am not so sure of it.

(Witness continuing:) I have not been acting as general manager of the Alaska Mines Corporation since its organization. I am not the general manager at the present time.

Q. How soon after the company was organized did you go on the pay-roll for \$6500.00 per annum?

A. In some three or four months.

(Witness continuing:) It was during the summer of 1916, during the year of organization. It was some considerable time after the transfer of the property from the Nome Holding Company to the



(Deposition of E. E. Powell.)

Alaska Mines Corporation. The transfer had nothing to do with the deal wherein I was to act as general manager under a salary of \$6500.00 per annum.

The Alaska Mines Corporation has an office at 71 Broadway, New York City. I made that my headquarters after they opened an office there, since May 1st. Prior to that time I was in Philadelphia. When I was in New York City I was in Mr. Crane's office.

Q. Now, as agent or general manager, or whatever you call yourself, for the Alaska Mines Corporation, you negotiated the [102] purchase of the Greenberg property, did you not?

A. No, sir, I did not.

(Witness continuing:) I helped to bring them together, helped to bring Mr. Greenberg and Mr. Gayley and Mr. Crane together, and they did the buying and selling. I talked with Mr. Greenberg a number of times.

Mr. Gayley and Mr. Crane and the other directors and officers of the Alaska Mines Corporation have never been in Alaska and they have no personal knowledge of the Greenberg property, nothing except what they found out from other parties.

Prior to the time that the Alaska Mines Corporation opened its office at 71 Broadway it had headquarters in Mr. Gayley's office.

Q. Now, Mr. Powell, the plaintiff in its complaint alleges that in 1914 and 1915 the plaintiff was litigating with the Nome Consolidated Dredging Company in the Court of Common Pleas in the City of Philadelphia, State of Pennsylvania. Did you per-

(Deposition of E. E. Powell.)

sonally appear at the trial of that action?

A. I did.

(Witness continuing:) There was an attorney employed and he appeared at the trial. I had resigned as general manager of the Nome Consolidated Dredging Company at that time. I resigned along in the spring of 1915 in writing. It is in Philadelphia with Mr. Furst, the secretary.

There was a suit commenced in Philadelphia in 1914. I don't remember the date. I testified in that action. The Nome Consolidated Dredging Company was represented in that case by counsel. Mr. Furst, an attorney of Philadelphia, was the attorney for the Nome Consolidated Dredging Company in that action. He participated in the trial and I testified as a witness. The notes that were involved in that lawsuit were executed by the Nome Consolidated Dredging Company by me as general manager. I signed the name of the Nome Consolidated Dredging Company to the notes that were offered in evidence.

Q. Was Mr. Newton present at the trial?

A. He came in as a witness once.

Q. Did he testify as a witness in the case?

A. Yes, sir, he did.

(Witness continuing:) Mr. Newton is a hotel man living in Philadelphia, where the [103] trial occurred. Mr. Eisenlohr was not a witness and did not testify. He wasn't in Philadelphia at the time. I don't know whether he knew about the case or not. I did not discuss it with him.

(Deposition of E. E. Powell.)

Q. Was any discussion of the lawsuit that was pending there had in your Board of Director's meeting of the Nome Consolidated Dredging Company?

A. No, sir, it was not.

(Witness continuing:) Mr. Newton, Mr. Eisenlohr and myself were all directors of the Nome Consolidated Dredging Company. We were directors at the time the suit was pending. At the time I testified I was not, but at the time that the suit was instituted I think that I was. Mr. Newton, Mr. Eisenlohr and myself were all directors of the Nome Consolidated Dredging Company at the time the notes were signed and delivered.

Q. Now, Mr. Powell, I subpoenaed you to bring with you a certain agreement that was executed between you and Mr. Newton and Mr. Eisenlohr, Dr. Sloan, George D. Schofield and others in the fall of 1914 or spring of 1915. Did you bring that with you?      A. I did, here it is.

(Whereupon the said paper was offered and received in evidence as "Plaintiff's Exhibit No. 1" to the deposition, said paper being in words and figures as follows, to wit:)

**Plaintiff's Exhibit No. 1 to Deposition of E. E. Powell—Proposed Outline of Reorganization of Nome Consolidated Dredging Company.**

**"PLAINTIFF'S EXHIBIT NO. 1.**

**PROPOSED OUTLINE OF REORGANIZATION.**

In case reorganization is undertaken of the Nome

(Deposition of E. E. Powell.)

Consolidated Dredging Company, and a new company to be formed, the following would be the proposed outline:

45% of the Capitalization to be donated to the new Company as Treasury stock, the balance to be divided as follows:

25% of the Capitalization to be given to E. E. Powell in lieu of the 27-1/3% now held by him.

15% to be given *pro rata* to those holding notes and bills or debts of the present Nome Consolidated Dredging Company;

15% to be placed at the disposal of E. E. Powell for the purpose of financing the new company.

The above outline is agreed to by the following holders of notes:

J. M. SLOAN.

E. E. POWELL.

GEO. D. SCHOFIELD.

E. L. WEBSTER.

LEWIS BREMER.

M. W. NEWTON.

LOUIS H. EISENLOHR." [104]

Q. That paper is not dated. Can you give me the approximate date when it was drawn up?

A. Why, the paper was typed in, I think, before we left Nome in the fall of 1914.

(Witness continuing:) It was signed by Mr. Schofield and myself, and the others signed in the spring of 1915.

Q. Now, was the Nome Holding Company that was organized in the fall of 1915, was its stock di-



(Deposition of E. E. Powell.)

vided up according to the percentages therein outlined in said paper?

A. No, it had nothing to do with this.

Q. I hand you herewith a page taken from the prospectus of the Alaska Mines Corporation. You have seen that prospectus before, haven't you?

A. I have.

Q. Just examine that page and tell me whether or not that correctly states the facts that is stated on that page, including the officers and directors of the Alaska Mines Corporation.      A. I believe so.

Q. With their various occupations?

A. Yes, sir; I think so.

(Whereupon the said paper was offered and received in evidence as "Plaintiff's Exhibit No. 2" to the deposition, said paper being in words and figures as follows, to wit:

**Plaintiff's Exhibit No. 2 to Deposition of E. E. Powell—Articles of Incorporation of Alaska Mines Corporation.**

(PLAINTIFF'S EXHIBIT NO. 2.)

"ALASKA MINES CORPORATION.

Incorporated July, 1916, under the laws of the State of Virginia.

Capital Stock \$10,000,000.

Shares Issued 3,781,000    Treasury Stock 6,219,000  
Par Value of Shares One Dollar, Fully Paid and  
Non-Assessable. All Common Stock. [105]

OPERATING OFFICE AND MINES,

Nome, Alaska.

Eastern Office:

71 Broadway, New York.

Western Office:

324 New York Block, Seattle, Wash.

OFFICERS:

President,

James Gayley.

Vice-Presidents:

Theron I. Crane.

Henry B. Livingston.

Secretary-Treasurer:

Walter S. Reed.

DIRECTORS:

Theron I. Crane, Philadelphia.

Pilling & Crane, Iron and Steel,  
Philadelphia.

Director Eastern Steel Company.

AUGUST HECKSCHER, New York,

Director N. J. Zinc Company.

Director Nipissing Mines Company.

Director Stewart Sugar Company.

LOUIS H. EISENLOHR, Philadel-  
phia,

Treasurer Eisenlohr Bros., Inc.,  
Philadelphia.

James Gayley, New York, Ex-Vice-

President United States Steel Cor-  
porations, Director American Insti-  
tute of Mining Engineers.

HENRY B. LIVINGSTON, New  
York,

Member N. Y. Stock Exchange

MAHLON W. NEWTON, Philadel-  
phia,

Proprietor of Greene Hotel, Phila-  
delphia.

ELLIS E. POWELL, Seattle.

EMPIRE TRUST COMPANY,

Transfer Agent,

Counsel:

BEEKMAN, MENKEN & GRIS-  
COM, 52 William St., New York.

FRANKLIN TRUST COMPANY,

Registrar.

CONSULTING ENGINEER,

F. H. MINARD,  
New York."

Q. Mr. Powell, at the time you bid in the assets of the Nome Consolidated Dredging Company in the Thatcher foreclosure who was president of the Nome Consolidated Dredging Company?

A. Mr. M. W. Newton.

Q. And who was secretary?

A. Mr. W. F. Furst.

(Deposition of E. E. Powell.)

Q. And they were the last officials of the corporation, were they?      A. Yes, sir, I think so.

(Witness continuing:) There have never been any successors elected up to the present time to my knowledge. I have had nothing to do with it for a long while. They were the officials of the Nome Consolidated Dredging Company during the year of redemption I think. I never heard of any successors being elected to succeed them. Mr. Newton was president of the Nome Consolidated Dredging Company at the time the mortgage was given in September, 1914. Mr. Eisenlohr, Mr. Webster and myself [106] were directors at that time. I was also the general manager. I executed the mortgages as general manager and vice-president. There were no changes in the directors of the Nome Consolidated Dredging Company subsequent to 1914 to my knowledge except myself, and I don't know whether any successor was elected to succeed me or not. I never heard of any if there was; I haven't tried to hear. So far as I know in 1915 and 1916 during the period of redemption the same directors and officers were holding their respective positions that they had at the time the mortgage was given.

Q. Just in order to get it clear into the record, who were the directors of the Nome Consolidated Dredging Company at the time that the Thatcher and Darling mortgages were voted to be given?

A. Mr. M. W. Newton, Louis H. Eisenlohr, Lewis Bremer, E. L. Webster and E. E. Powell.

(Deposition of E. E. Powell.)

(Witness continuing:) Mr. Newton was one of the creditors covered by the mortgages; so also were Mr. Eisenlohr, Mr. Webster and myself. Mr. Webster was one of the parties who became interested in the Thatcher mortgage for \$25,000 subsequent to the issuing of the mortgage notes. He handed me \$2,000 cash in the spring of 1914, and he held notes under the Thatcher mortgage. There was an existing debt due him at the time the Thatcher mortgage was made. The intention in the fall of 1914 was to include it all in one mortgage but Mr. Thatcher refused to join the bank's indebtedness with the remainder of the creditors. That is the reason two mortgages were made.

(Signed) E. E. POWELL."

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 6, 1917.  
G. A. Adams, Clerk.

**PLAINTIFF RESTED.**

Whereupon the defendant, Alaska Mines Corporation, offered the separate answer of the said Alaska Mines Corporation to plaintiff's complaint, which said answer had been theretofore filed by said defendant, and the same was read and received in evidence, being in words and figures as follows, to wit:

(Title of Court and Cause.)

**Separate Answer of Alaska Mines Corporation.**

Comes now the Alaska Mines Corporation, a corporation, one of the defendants herein named, and



for its separate answer [107] to the alleged cause of action in the complaint herein contained, admits, denies and alleges as follows:

### I.

It admits the allegations of paragraph I of said complaint, except as follows: It denies that said defendant, Nome Consolidated Dredging Company, a corporation, was at or for some time prior to the commencement of this action, or at any time since, doing business in the Territory of Alaska; it denies that E. E. Powell was at or for more than one year prior to the commencement of this action, or at any time since, vice-president, general manager or any other officer of said defendant, Nome Consolidated Dredging Company; it denies that said E. E. Powell was or is the treasurer or principal stockholder of the defendant, Alaska Dredging Company, as alleged in said paragraph; it denies that either of said defendants M. W. Newton, E. L. Webster or Louis Eisenlohr, was at any of said times a principal stockholder of said defendant, Nome Consolidated Dredging Company, as therein alleged; it denies that said defendant, George D. Schofield, was general counsel or attorney of either of the defendants referred to in said paragraph, prior to the year 1912, or subsequent to the year 1915.

### II.

It denies each and every allegation, matter, statement and thing contained in paragraph II of said complaint, save and except that it denies any knowledge or information thereof sufficient to form a belief as to whether or not an action was pending in the

Court of Common Pleas for the city and county of Philadelphia, State of Pennsylvania, at the time or entitled as alleged in said paragraph II, or otherwise, or as to whether or not any judgment was ever recovered in any such alleged action. [108]

### III.

Answering the allegations of paragraph III of said complaint, this defendant admits that on the 14th day of September, 1914, said Nome Consolidated Dredging Company, by and through said E. E. Powell, then its vice-president, made, executed and delivered to said F. H. Thatcher, trustee, a certain trust deed or mortgage, thereby conveying to said F. H. Thatcher, certain real and personal property of said mortgagor, to secure an issue of promissory notes aggregating the sum of Twenty-five Thousand Dollars (\$25,000); that said notes consisted of a series of thirty-seven (37) notes, numbered consecutively; that said notes were delivered to the respective persons or parties therein stated, except the Sloan note which was delivered to one J. W. Olford.

It expressly denies that said notes, or any of them, were delivered to or held by said E. E. Powell, as or for the purpose or purposes alleged or referred to in said paragraph or said complaint, or otherwise, except that it admits and alleges that all of said notes, long after the execution and delivery thereof and of said mortgage and after default in the terms thereof, were delivered to said E. E. Powell as trustee, for the respective owners and holders of said notes, for the sole purpose of procuring a foreclosure of said mortgage securing said notes and the sale

under such foreclosure of the premises and property described in and mortgaged by said trust deed or mortgage. It expressly denies that said defendant, Nome Consolidated Dredging Company, acting by or through said E. E. Powell, or otherwise, ever paid said Alaska Banking & Safe Deposit Company, or any owner or holder of either of said promissory notes any money, sum or amount whatsoever, on account thereof [109] or of the indebtedness evidenced by said promissory notes or secured by said mortgage, either as alleged in said paragraph or complaint, or otherwise; and it denies that the said indebtedness to said bank, as evidenced by either or all of said notes or secured by said mortgage was at the time of the foreclosure of said mortgage paid in whole or in part; but it admits that prior to such foreclosure said notes so owned and held by said bank were sold by it, for value, and were delivered to and held by said E. E. Powell, as trustee for the purchaser or purchasers thereof, and said bank had no interest in said notes at the time of such foreclosure proceedings.

Further answering the allegations contained in said paragraph III, this defendant admits that on the 16th day of September, 1914, said Nome Consolidated Dredging Company, acting by and through said E. E. Powell, as its vice-president, made, executed and delivered to one, J. M. Sloan, as trustee, its certain other trust deed or mortgage, conveying and mortgaging certain of the real and personal property of the said mortgagor to said J. M. Sloan, as trustee, as security for the payment of a series of

seventy (70) promissory notes numbered consecutively from one (1) to seventy (70); but this defendant expressly denies that said last-mentioned mortgage or trust deed, or the notes so issued and secured thereby, were made, executed, or delivered with any intent to hinder, delay or defraud the creditors of said Nome Consolidated Dredging Company, or the plaintiff herein.

It admits the delivery of said four notes, numbered 1, 34, 64 and 65 to the defendant, Louis Eisenlohr, and of said fourteen notes, numbered 36, 37, 38, 39, 40, 49, 50, 58, 59, 60, 61, 62 and 63 to the defendant, M. W. Newton, and the delivery of the remainder of said series of [110] promissory notes to said defendant, Alaska Dredging Company.

It expressly denies that said notes were not delivered as aforesaid, or that the same, or either of them, was spurious or worthless, or that the same were kept in the possession of said E. E. Powell, for the purpose of defrauding the plaintiff herein, or any person, firm, or corporation, or in pursuance to or in furtherance of any plan, scheme, or conspiracy to defraud, as alleged in said paragraph or complaint or otherwise.

Except as herein expressly admitted or otherwise denied, this defendant denies each and every allegation, matter, statement and thing contained in said paragraph III.

#### IV.

This defendant denies each and every allegation, matter, statement and thing contained in paragraph IV of said complaint.



## V.

It denies each and every allegation, matter and statement contained in paragraph V of said complaint.

## VI.

Answering paragraph VI of said complaint this defendant admits the commencement of said suit in this court, being said cause Number 2608, referred to, entitled as alleged, for the purpose of foreclosing said so-called Thatcher mortgage; it denies that said suit was brought pursuant to any plan or scheme mentioned or referred to in said paragraph or complaint, and denies that said Powell employed an attorney to appear for or represent said Nome Consolidated Dredging Company, as defendant in said cause. It admits that said C. E. Darling had theretofore been substituted for said J. M. Sloan, as trustee, in said so-called Sloan mortgage; [111] that said E. E. Powell, then holding all the notes secured by said Sloan mortgage, but solely as trustee for the respective owners thereof, employed an attorney to represent said C. E. Darling in said cause, and that such attorney appeared and filed a cross-complaint and answer for said Darling, as trustee, in said suit. It admits that said cause came on for trial on July 1st, 1915, seven days after the same was commenced, and that a decree of foreclosure was duly entered in said cause, a copy of which decree is annexed to said complaint, and marked Exhibit "A."

This defendant admits that the property described in and covered by said mortgages was sold on exe-

cution by the United States Marshal for the Second Division of the Territory of Alaska, pursuant to said decree of foreclosure, and that said E. E. Powell bid in and purchased all of the personal property so sold for the sum of \$20,000.00 and all the real property so sold for the sum of \$3,000, as shown by said marshal's return, a copy of which is annexed to said complaint, marked Exhibit "B." It admits that said E. E. Powell so bid in and purchased said real and personal property for the use and benefit of and as trustee for himself and the owners of the promissory notes secured by said two mortgages, all as set forth in said decree of foreclosure.

This defendant expressly denies that said action was commenced or prosecuted, or that any step or proceeding was had or taken therein or that said judgment was procured, or entered, or said sale made with any intent or purpose on the part of said E. E. Powell, or any party to or interested in said cause, or any party to this cause, or any other party whomsoever, to hinder, delay or defraud plaintiff herein, or any stockholder or creditor of said Nome Consolidated Dredging Company, or any other person, firm or corporation whomsoever; [112] and it denies that either of said promissory notes referred to was spurious or worthless or without full consideration therefor, and defendant expressly denies each and every allegation, statement or inference of fraud or fraudulent or wrongful purpose, scheme, plan or intent contained in said paragraph VI, or elsewhere in said complaint, and further, except as in this paragraph expressly admitted or denied, this

defendant denies each and every allegation, matter, statement and thing therein contained.

#### VII.

This defendant denies each and every allegation, matter, statement and thing contained in paragraph VII of said complaint, save and except that it admits that long prior to the commencement of this action, it became and ever since has been the sole and exclusive owner of the property, real and personal, so sold under execution sale under foreclosure of said two mortgages; that it is now in the sole and exclusive possession thereof, and claims such ownership and right of possession as a *bona fide* purchaser for value thereof.

#### VIII.

Answering the allegations of paragraph VIII of said complaint, this defendant admits that said E. E. Powell, as trustee, immediately after the execution sale referred to, took possession of all the property so sold, and that he refused to recognize the Nome Consolidated Dredging Company, as the owner of any of said property thereafter, except the right of the said Nome Consolidated Dredging Company to redeem the said sale of said real property as provided by law; it admits that this defendant in August, 1916, became the owner of all of said real and personal property, none thereof having been redeemed from such sale, and that it is conducting mining operations upon certain of said mining claims; and that [113] such claims are valuable only for the gold therein contained, and will be rendered worthless when such gold is mined therefrom;

but it denies that it has extracted any considerable part of the gold from said mining claims.

It admits that it is using the machinery and equipment purchased by it, which was sold at said execution sale, but it denies that the same is being worn or depreciated or will be rendered valueless; but on the contrary alleges that it has spent, and intends to and will spend large sums of money, far in excess of plaintiff's alleged claim, in repairing said machinery and equipment and putting the same in first class workable condition, and maintaining the same in such condition, in purchasing new machinery and equipment for use in connection therewith and upon said mining claims and in the purchase of other mining claims. This defendant admits that it claims to be the owner of the property set forth in said decree of foreclosure, and refuses to recognize any right, title or interest therein in the said Nome Consolidated Dredging Company, but it expressly denies that it has ever threatened or intended to sell the same, but, on the contrary, it intends to and has actually added thereto and to the value thereof many times the amount of plaintiff's alleged claim.

Except as herein expressly admitted, or denied, this defendant denies each and every allegation, matter, statement and thing contained in said paragraph VIII.

### IX.

It denies each and every allegation, matter, statement and thing contained in paragraph IX of said complaint.

Further answering said complaint and as an af-



firmative defense to the alleged cause of action therein contained this defendant alleges: [114]

I.

That it is a corporation organized, created and existing under and by virtue of the laws of the State of Virginia, with its principal office in the city of Richmond, in said State; and that its principal office and place of business is in the city of New York, State of New York. That it was so organized on the 9th day of June, 1916, but that none of the organizers of this defendant corporation was then or had ever been an officer, agent or employee of either of the other corporations, or an employee or business associate of either of the individual persons mentioned or referred to in the complaint herein. That the capital of the defendant is Ten Million Dollars (\$10,000,000), divided into ten million shares of the par value of One Dollar (\$1.00) per share.

II.

That after the sale of the real property mentioned and referred to in the complaint herein, by the United States Marshal of the Second Division of the Territory of Alaska, to said E. E. Powell, this court, by its order, duly made and entered in the foreclosure suit referred to in said complaint, and on, to wit, the 27th day of September, 1915, duly and regularly confirmed the said sale of said real property to said E. E. Powell; all as appears from the records and files in said cause number 2608 of the clerk of this court.

That on, to wit, the 24th day of July, 1915, the said United States Marshal, pursuant to law and the said

sale under execution of the personal property referred to in the complaint herein and Exhibit "B" thereto attached, duly made, executed and delivered to said E. E. Powell, his bill of sale, as such United States Marshal, of all of such [115] personal property, which bill of sale was thereafter, and on the 26th day of July, 1915, at 11:10 o'clock A. M., duly filed for record in the office of the United States Commissioner and ex-officio Recorder for the Cape Nome Recording District, in the Territory of Alaska, and the same was duly recorded in said office in Volume number 197 at pages 397, etc., of the records thereof, a copy of which said bill of sale with the recorder's endorsement thereon is hereunto annexed, marked Exhibit "A" and made a part hereof.

### III.

That thereafter and on, to wit, the 28th day of September, 1916, and more than one year after the date of said sale under said execution on foreclosure of said real and personal property, and said confirmation thereof, said real property not having been redeemed from such sale, the said United States marshal duly made, executed, acknowledged and delivered to said E. E. Powell, his deed and conveyance as such marshal, of all of the said real property so sold under said execution on such foreclosure, which deed and conveyance was thereafter and on, to wit, the 30th day of September, 1916, at 2:15 o'clock P. M., filed for record in the office of said United States Commissioner, and was duly recorded in Volume 200 at pages 133, etc., of the

records thereof; a copy of which said deed, with the recorder's endorsement thereon is hereunto annexed, marked Exhibit "B" and made a part hereof.

#### IV.

That on, to wit, the 25th day of October, 1915, the said E. E. Powell duly made, executed and acknowledged, and delivered to the Nome Holding Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of Washington, a deed and conveyance of all [116] of the said property, both real and personal, which had been so theretofore sold by said United States Marshal under said execution to said E. E. Powell, which deed and conveyance was thereafter and on, to wit, said 25th day of October, 1915, at 5:00 o'clock P. M. duly filed for record in the office of said United States Commissioner, and was duly recorded in Volume 197 at pages 476, etc., of the records thereof; a copy of which said deed and conveyance with the recorder's endorsement thereon is hereto annexed, marked Exhibit "C" and made a part hereof.

#### V.

This defendant further alleges that on the 15th day of August, 1916, the said Nome Holding Company, a corporation, then claiming to be the sole and lawful owner, and lawfully seized and in possession of all of the property, real and personal, and property rights mentioned and referred to in the complaint herein, and so mortgaged to said F. H. Thatcher, as trustee, and to J. M. Sloan, as trustee, and so sold on execution under foreclosure of said mortgages to said E. E. Powell, and so sold by him

to said Nome Holding Company, offered to sell, transfer and convey all of the said property, real and personal, and property rights to this defendant. That said Nome Holding Company was then in sole and exclusive possession of all of said property and was the sole record owner of all thereof as aforesaid, subject to two certain mortgages of record thereon, aggregating the sum of \$300,000.00. That thereupon, and on said 15th day of August, 1916, this defendant, relying upon the said claim of ownership of said property by said Nome Holding Company, and upon its said possession thereof and its record title thereto, purchased said property and all [117] thereof, both real and personal, and property rights, from said Nome Holding Company, and delivered to said Nome Holding Company therefor certificates for three million seven hundred and one thousand and eight hundred and twenty shares (3,701,820) fully paid, nonassessable shares of the capital stock of this defendant, of the par value of one dollar (\$1.00) per share. That said shares of stock actually and truly paid and delivered to said Nome Holding Company, were then worth and of the full fair value of the said property so purchased from said Nome Holding Company.

## VI.

That thereupon and on said 15th day of August, 1916, the said Nome Holding Company, duly made, executed, acknowledged and delivered to this defendant its two certain deeds and conveyances, each dated on said day, wherein and whereby it deeded, transferred and conveyed unto this defendant, its



successors and assigns, all and singular the said property, real and personal, and property rights. That each of said deeds and conveyances was duly filed for record in the office of said United States Commissioner on the 5th day of September, 1916, at 4:00 o'clock P. M., and each thereof was duly recorded in volume 200 of the records thereof, one thereof being recorded on pages 113 and 114 of said volume, and the other on pages 114 and 115 thereof. That hereunto annexed, marked Exhibit "D" and made a part hereof is a true copy of one of said conveyances, with the recorder's endorsement thereon; that hereunto annexed marked Exhibit "E" and made a part hereof is a true copy of the other of said conveyances, with the recorder's endorsement thereon.

## VII.

This defendant alleges that it so purchased all of said property, real and personal, and property rights, [118] in good faith, for a full and valuable consideration paid and delivered to said grantor, without any notice or knowledge, actual or constructive, of the said alleged and pretended claim or indebtedness of said plaintiff, or of any of the alleged acts, plans, schemes, purposes or intentions, either of the other defendants herein, or of any other person or corporation mentioned in said complaint, or of any other person or corporation which are alleged, mentioned or referred to in said complaint, to hinder, delay or defraud the plaintiff herein, or any creditor or stockholder of said Nome Consolidated Dredging Company, or any other person, firm

or corporation, and this defendant alleges that it is now, and ever since said August 15th, 1916, has been a *bona fide* purchaser of all of said property, for a valuable consideration, without notice or knowledge, actual or constructive, of any outstanding right to or lien upon the same, or any part thereof, of the plaintiff herein, or any other person, firm or corporation, save the two mortgages on said property referred to in said Exhibit "D," and without any purpose or intent on the part of this defendant to hinder, delay or defraud plaintiff herein, or any creditor or stockholder of said Nome Consolidated Dredging Company, or any person, firm or corporation whomsoever.

### VIII.

This defendant further alleges that, in addition to the certificates for stock so issued and delivered by it to said Nome Holding Company, in payment for said property, and prior to the commencement of this suit, it sold for valuable considerations, and issued certificates for large amounts of its capital stock, to other persons and corporations, who were and are wholly ignorant of the plaintiff's [119] alleged claim, which certificates are now outstanding in the hands of *bona fide*, innocent purchasers thereof; such additional certificates exceeding in the aggregate six hundred thousand shares (600,000).

That it has also purchased other real and personal property, than that mentioned and referred to in the complaint herein, and that it is now engaged in mining operations at Nome, Alaska. That it is perfectly solvent, having assets of a fair value far

in excess of the plaintiff's alleged and pretended claim, and if said plaintiff should be held in this cause to be entitled to enforce any claim against any property of this defendant, it is perfectly able to pay the same, without the necessity of the appointment of any receiver by this court.

WHEREFORE, this defendant, having fully answered the said complaint, prays judgment that the plaintiff take nothing against it in this action, but that the *same dismissed* as to this defendant, with its costs and disbursements herein incurred.

O. D. COCHRAN,  
LYONS & ORTON,  
F. T. MERRITT,

Attorneys for Defendant, Alaska Mines Corporation.

United States of America,  
Territory of Alaska,—ss.

H. S. Thompson, being first duly sworn, deposes and says:

That he is the auditor and assistant treasurer of the Alaska Mines Corporation, answering defendant in the [120] above-entitled action, and that he now resides in Nome; that he has read the above and foregoing answer and knows the contents thereof and believes the same to be true. That the reason why this verification is made by affiant is because none of the officers of the Alaska Mines Corporation reside, or have an office in the District of Alaska.

H. S. THOMPSON.

Subscribed and sworn to before me this 4th day of September, 1917.

[Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

**Exhibit "A" to Separate Answer of Alaska Mines Corporation.**

#62092.

**MARSHAL'S BILL OF SALE.**

KNOW ALL MEN BY THESE PRESENTS, That I, E. R. JORDAN, United States marshal in and for the Second Division, District of Alaska, by virtue of my office and by virtue of a public sale, duly advertised and had according to law on the 14th day of July, 1915, under a Special Writ of Execution and Order of Sale issued out of the District Court for the District of Alaska, Second Division, on the 2d day of July, 1915, in an action in said court entitled F. H. Thatcher, Trustee, E. E. Powell, Geo. D. Schofield, E. L. Webster, J. M. Sloan and E. E. Powell, Trustee, plaintiffs, and against Nome Consolidated Dredging Company, a corporation, and C. E. Darling, Trustee, defendants in cause No. 2608, at which sale E. E. Powell, one of the plaintiffs, was the successful bidder, and purchased all of the right, title, and interest of the said defendants in and to the personal property hereinafter specified and described, for the sum of twenty thousand (\$20,000) dollars, the receipt of which sum is hereby acknowledged [121] and credited upon the Judgment in the above-entitled



cause according to the terms of and in keeping with the Special Writ of Execution and Order of Sale above referred to; do now and by these presents herewith, in consideration of the premises herewith transfer, assign, and set over all of the right, title and interest of the above named (Ex. "A"—1) defendants in and to the following described personal property to E. E. Powell, one of the plaintiffs in the above-entitled action, he already having been given full and free possession of said personal property on the day of said sale:

1, Heater; 2, Counters situated on the 1st floor in building located on Lots 28, 29, and 30, in Block 16 of the Town of Nome; 1 Standing Desk; 1 L & H Filing Case, 5 sections; 1 Book Rack (for Ledgers); 1 Rug, 21½x5'; 2 High Stools; 1 Office Counter; 1 Pro-tectograph; 1 Y & E Perforator; 2 Three Tier Wire Desk Baskets; 1 Automatic Pencil Sharpener; 1 Roll Top Desk; 1 Short Standing Desk; 1 Type-writer Desk; 1 Garland Heater and Stove Mat; 1 Enclosed Balance & Weights; 1 Card Case; 1 14" Underwood Typewriter; 1 Show & Walker Filing Case, 5 sections; 2 Cane Seat Arm Chairs; 1 Large Roll Top Desk; 3 Swivel Chairs; Desk Light; 1 Office Rug, 9x12; 1 Troemner Gold Balance & Weights; 1 Stand for Balance; 1 Columbia Dicta-  
phone (complete); 1 Dictaphone Shaving Machine; 1 Dictionary Holder; 16 ¾ Diamond Point Chisels; 4 ¾x5 Diamond Point Chisels; 33 ⅞ Cold Chisels; 18 Bal Pein Hammers; 8 6" Stillson Wrenches; 7 8" Stillson Wrenches; 11 14" Stillson Wrenches;

8 8" Monkey Wrenches; 10 12" Monkey Wrenches; 23 14" Flat Bast Files; 40 14" Half Round Bast Files; 42 14" Round Bast Files;

All of the above situated on the 2nd floor in building located on lots 28, 29 and 30 in block 16 of the [122] Town of Nome.

Linoleum on floors; 1 Rug; *L* small table; 2 Drawer Dresser; 1 *Mirror* and Hat (Ex. "A"—2) Rack; 1 large Rug on floor; Several Rockers; 2 Morris Chairs; 1 1 Book Case; 1 Secretary; 1 Screen; 1 Couch complete with mattress; 1 Dining Table; 2 Chairs; 1 Sewing Machine; 1 Side Board; 1 Carpet Sweeper; 1 Rug on floor; 1 stove (cookstove); Dishes and crockery for 6 persons; 2 small tables; 1 wash stand; 1 *mirror*; 1 large hard coal heater with mat; 1 single bed, complete; 1 small iron bed with mattress; 1 dresser; 1 rocker; Straw matting; carpet sweeper; 1 dresser; 1 full iron bed complete; 1 small table; blankets and pillows.

All of the above in building situated on Lot #40 Block #30 in the Town of Nome.

1 Cascade Stove; 1 table; 1 sink; 1 wash bowl; oil cloth on floor; 1 Wilton chair; 1 Steamer chair; 1 wash stand; 1 table; 1 rug on floor; 1 chiffonier; 1 couch; 1 rug on floor (old); 1 dress box; 1 rug on downstairs bedroom (old); 1 new rug; several rocking chairs; 1 hor blast heater;

All of the above in building situated on Lot #10 and #11 in Block #91, of the Town of Nome.

1 Power Plant, Westinghouse Equipment, for generating 650 K. W. Turbine driven, Babcock Wil-

cox Boilers, 3 units 150 H. P. each; Auxiliary Equipment complete.

1, 5,000 barrel steel tank, with  $\frac{3}{4}$  mile of 4" pipe and  $2\frac{1}{2}$  miles of 2" pipe;

$\frac{1}{4}$  mile Narrow *Guege* Railroad; 2 Wood frames; corrugated iron warehouses; 1 Wood constructed warehouse; 1 Wood Construction Warehouse and shop; 1 Wood construction warehouse and repair house; 1 Wood construction Mess House; 3 Wood construction Bunk Houses; [123]

Miscellaneous supplies used in (Ex. "A"—3) connection with dredging operations; spare parts, heating and thawing plants.

2 Automobiles; all assaying and refining supplies, tools and utensils; 1 Keystone Drill; 1 Seven Cubic Feet connected bucket, Bucyrus Type Dredge; also all cables and appurtenances, thereunto belonging; 1 Transmission line from Power Plant on Bourbon Creek to dredge on Bourbon Creek;

All of the above situated on Bourbon Creek in the Cape Nome Recording Precinct, District of Alaska.

1 Transmission Line from Power Plant on Bourbon Creek to dredge on Wonder Creek; 1 Seven Cubic feet open connected bucket, Bucyrus Type Dredge, all cables and appurtenances thereunto belonging; 1 Mess House and furniture and fixtures therein; 2 Cabins; 2 Keystone Drills;

All of the above situated on Wonder Creek in the Cape Nome Recording Precinct, District of Alaska.

Also all Miscellaneous supplies used in connection

with dredging operations; spare parts, heating and thawing plants.

1 unfinished Dredge, situate on No. 2 Below on Wonder Creek in the Cape Nome Recording Precinct, Dist. of Alaska.

2 100 H. P. Boilers, situated on No. 13 Below on Dry Creek, in the Cape Nome Recording Precinct, District of Alaska.

Also all engines, boilers and piping situated in Company's warehouses and on the property, together with all mining appliances and other personal property of every name, nature and description, situated in the Cape Nome Recording Precinct, District of Alaska.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of July, 1915. [124]

E. R. JORDAN,

United States Marshal, Second Division, District of Alaska.

By A. B. Miller,

Chief Deputy.

Recorded July 26, 1915, 11:10 A. M., at request of E. E. Powell.

JAMES FRAWLEY,

Recorder.

(Ex. "A"—5) Recorded, Vol. 179, Page 397.



**Exhibit "B" to Separate Answer of Alaska Mines Corporation.**

#64371.

Form No. 159.

**UNITED STATES MARSHAL'S DEED.**

THIS INDENTURE made and entwred into this 28th day of September, in the year of our Lord 1916, between E. R. JORDAN, United States Marshal for the 2d Division, District of Alaska, by virtue of his office of the first part, and E. E. POWELL, of Nome, Alaska, of the second part;

WITNESSETH: That, whereas, at a regular term of the District Court of the United States, held in and for said District on the first day of July, in the year A. D. 1915, F. H. Thatcher, Trustee, E. E. Powell, Geo. D. Schofield et al., Plaintiffs, recovered a judgment against Nome Consolidated Dredging Company, et al., Defendants in a certain plea for the sum of \$26,420.56 and \$379.10 costs of suit; and whereas, on the second day of July, A. D. 1915, a Writ of Special Execution issued from said District Court for the Collection of said judgment, and said Writ was directed to said E. R. Jordan, United States Marshal as aforesaid, and that said writ was levied by the said United States Marshal by virtue of his office, and according to the statute in such [125] case made and provided, on the third day of July, A. D. 1915, upon a certain tracts or parcels of land, hereinafter described, and which said lands were advertised for sale by said United States Marshal ac-

according to law, and afterwards, to wit, on the second day of August, A. D. 1915, in pursuance of said advertisement, the United States Marshal exposed said lands to public sale at Nome, Alaska, (Ex. "B"—1) and E. E. Powell bid the sum of Three thousand and 00/100 (\$3,000.-00) Dollars therefor, which being the highest and best bid, the said land and premises were struck off and sold to him, the said E. E. Powell and the said E. E. Powell and his assigns became entitled to a Deed for the said premises from the said United States Marshal because the said premises were not redeemed according to law.

NOW, THEREFORE, I, E. R. JORDAN, United States Marshal of said District, by virtue of my office, and by force of the statute in such case made and provided, for and in consideration of three thousand (\$3,000) dollars in hand paid to me by the said E. E. Powell, according to the terms of said Writ, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said E. E. Powell, all the right, title, interest, and claim which the said Nome Consolidated Dredging Company, a corporation and C. E. Darling, Trustee, Defendants on the days of sale aforesaid, had in and to the following-described tracts or parcels of land, to wit: Placer mining claims and other real property known as Carnation Group, situated on Wonder Creek; Bonanza Association Claim, situated at the east side of the City of Nome, townsite; Anderson Claim situated on the West side of Bonanza Claim; one-half interest in No. 4 Bench, Left Limit, of No. 4

Below on Dry Creek; also five [126] hundred and forty-two acres, against which is still owing approximately twenty-six thousand dollars, falling due this year (1915) and next (1916), known as the "Bell" Claim, a bench off the right limit of No. 2 Flat Creek; No. 1 Above on Wonder Creek; Four Claims, Jewel, Gold Dust, Lucky Two, No. 2 Claim (Ex. "B"—2) and Juanita, situated off the Left Limit of No. 13 Below on Dry Creek; Moonlight claim, situated second tier of benches off No. 10 Below on Dry Creek; Combination Claim, situated off No. 4 and No. 5 Below right limit Dry Creek; Johnson Group, one-half interest in three claims situated on the left limit of No. 2 Above on Dry Creek, and described as Tibbets, Convex, and Concave Claim; big 5 Claim, situated second tier benches off Nos. 11 and 12 Below on Dry Creek. The Milton and Dover Association Claims at the mouth of Little Creek; No. 5 Peluck and No. 2 Tundra, North of the Milk Ranch, east of Nome; Sheldon No. 2 off No. 2 below on Wonder, L. L. Also approximately 521 acres held under twenty-year lease and option from the Anvil Hydraulic and Drainage Company, owners, operated under lease with contract providing deed shall pass to operating company when royalty equals purchase price. This is a nearly contiguous piece of property lying along the two beds of Bourbon Creek, East Bourbon Creek, Holyoke Creek, Saturday Creek and Lake Creek, as shown by one certain contract and lease recorded in Nome Recording District, District of Alaska. Also 52½ acres held under lease and option

for 20 years, property owned by the Alaska Dredging Company, situated on Wonder Creek and a contiguous piece of property. Two lots and building; lots 10 and 11, block 91; one lot and building; lot 40, block 30, situated in the Town of Nome. One office building and lots known as [127] 28, 29 and 30 in block 16, situated in the Town of Nome. Six miles of ditches leading from headwaters of Dry Creek to the southern line of the property, adjoining the City of Nome, all in Cape Nome (Ex. "B"—3) Recording Precinct, 2d Division, Territory of Alaska.

TO HAVE AND TO HOLD the said tracts or parcels of land together with the appurtenances thereunto belonging, unto the said E. E. Powell and his heirs and assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 28th day of September, in the year of our Lord one thousand nine hundred and sixteen.

E. R. JORDAN, (Seal)

United States Marshal for the 2d Div. District of Alaska.

United States of America,  
2d Div. District of Alaska.

I, G. A. Adams, Clerk of the District Court of the United States for the 2d Division, District of Alaska, do hereby certify that E. R. Jordan, United States Marshal for the said 2d Div. District of Alaska, who is to me known to be the person named in and who executed the foregoing deed of conveyance this day



personally appeared before me and acknowledged that he executed the same as said United States Marshal, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Nome, in said District, this 28th day of September, in the year of our Lord one thousand nine hundred and sixteen.

(Court Seal)

G. A. ADAMS,  
Clerk.

(Ex. "B"—4) Recorded September 30, 1916, 2:15  
P. M. at request [128] of O. D.  
Cochran.

JAMES FRAWLEY,  
Recorder.

(Ex. "B"—5) Recorded Vol. 200, Page 133.

**Exhibit "C" to Separate Answer of Alaska Mines  
Corporation.**

#62609.

THIS INDENTURE, Made this 25th day of October, 1915, between E. E. POWELL, of Nome, Alaska, Party of the first Part, and the NOME HOLDING COMPANY, a corporation organized under the laws of the State of Washington, Party of the Second Part.

THAT WHEREAS, the party of the first part heretofore and on the 14th day of July, 1915, at Nome, Alaska, purchased from the United States Marshal for the Second Division in the Territory of Alaska, at a sale regularly made by said marshal under and pursuant to a writ of execution issued out of the

District Court for the Territory of Alaska, in the Second Division, in a cause entitled, F. H. Thatcher, Trustee, E. E. Powell, Geo. D. Schofield, E. L. Wesbter, J. M. Sloan, and E. E. Powell, Trustee, Plaintiffs, vs. Nome Consolidated Dredging Company, a Corporation, and C. E. Darling, Trustee, Defendants, said cause being numbered in said court 2608, certain personal property belonging to said defendant, Nome Consolidated Dredging Company, and

WHEREAS, the party of the first part did purchase from the United States marshal at a sale regularly made by said marshal, under and pursuant to said writ of execution, issued out of said court in said cause, certain real property hereinafter particularly described, now, [129]

THEREFORE, the said party of the first part for and in consideration of the sum of ten dollars (\$10.00) lawful money of the United (Ex. "C"—1) States of America, to him in hand paid, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, convey, confirm and quit-claim unto the said Second Party, its successors and assigns, all of the right, title and interest acquired by the said party of the first part in and to said real and personal property under and by virtue of said sales made by the said United States marshal for the Second Division, for the Territory of Alaska as aforesaid, said real and personal property being situated in the Cape Nome Mining and Recording District and Precinct,

in the Territory of Alaska, and being particularly described as follows, to wit:

### PERSONAL PROPERTY:

All of the office furniture located in the upper part of the building located on lots 28, 29 and 30, in Block 16 of the town of Nome, but not including the personal furniture in the 3 east rooms, off office.

All of the furniture and fixtures located in the lower part of the building situated on lots 28, 29 and 30, Block 16 in the town of Nome.

All of the furniture and fixtures located in the house situated on lot No. 40, Block No. 30, in the town of Nome.

All the furniture and fixtures located in the house situated on lots No. 10 and 11, Block 91 in the town of Nome.

One Power Plant, Westinghouse equipment for generating 650 K. W. Turbine Drive Babcock-Wilcox Boilers, 3 units, 150 H. P. each, Auxiliary equipment complete.

One 5,000 barrel steel tank with  $\frac{3}{4}$  mile of 4" pipe-line and  $2\frac{1}{2}$  miles of 2" pipe-line.

One-half mile narrow *guage* railroad.

Two wood frame, corrugated iron warehouses.

One wood construction warehouse.

One wood construction warehouse and shop.

One wood construction warehouse and repair shop.

One Wood construction Mess House.

Three Wood Construction Bunk Houses.

Miscellaneous supplies used in connection with dredging, spare part, heating and thawing plants.

1 Automobile Truck.

All assaying and refining supplies, tools, and utensils.

(Ex. "C"—2) 1 Keystone Drill.

1 Unfinished Dredge known as No. 3

Dredge. [130]

2 100 H. P. Boilers.

1 Thawing plant, 2 70, H. P. Boilers, points, piping, etc.

1 Oil Tank.

Supplies, materials, and repair parts near Wonder Creek Dredge.

#### REAL ESTATE:

Carnation Group, situated on Wonder Creek.

Bonanza Association Claim situated at the east side of the City of Nome, excepting \$324.00 due, as shown under claim "final payment to be made."

Anderson Claim situated on the west side of Bonanza Claim.

One-half interest in No. 4 Bench left limit of No. 4 Below on Dry Creek.

Also five hundred and forty-two acres, against which is still owing approximately twenty-six thousand dollars, falling due this year and next.

No. 1 above on Wonder Creek.

Four claims, Jewel, Gold Dust, Lucky Two, No. 2 Claim and Juanita, situated off the left limit of No. 13 Below on Dry Creek.

Combination Claim situated off No. 4 and 5 Below right limit Dry Creek.

Johnson Group approximately one-half interest in three claims situated off the left limit of No. 2 Above



on Dry Creek, and described as Tibbets, Convex, and Concave, and also the Stockton Claim.

No. 5 Peluck, subject to a payment of \$400.00.

No. 2 Tundra Claim, north of the Milk Ranch, east end of Nome, subject to payment of \$1,000.00.

Sheldon No. 2 off No. 2 Below on Wonder Creek, subject to payment of \$600.00.

Two lots and buildings, lots 10 and 11, Block 91,

One lot and building, lot 40, Block 30, situated in the Town of Nome.

One office building and lots known as 28, 29 and 30, in Block 16, situated in the town of Nome.

Six miles of ditch leading from heatwaters of Dry Creek to the southern limits of the property, adjoining the City of Nome.

TOGETHER with all and sinbular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and (Ex. "C"—3) to their heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year [131] first above written.

E. E. POWELL.

Signed, sealed and delivered in presence of:

F. SCHENCK.

E. L. SISK.

United States of America,  
Territory of Alaska,—ss.

This is to certify that on this 25th day of October, 1915, before me, a Notary Public in and for the Territory of Alaska, appeared the foregoing named E. E. Powell, known to me to be the identical person described in, and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein named.

IN WITNESS WHEREOF, I have hereunto affixed my notarial seal.

[Notarial Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

(Revenue Stamp \$5.00.)

Recorded October 25, 1915, 5:00 P. M. at request of E. E. Powell.

JAMES FRAWLEY,

Recorder.

(Ex. "C"—4) Recorded Vol. 197, page 476.

**Exhibit "D" to Separate Answer of Alaska  
Mines Corporation.**

#64248

KNOW ALL MEN BY THESE PRESENTS,  
That NOME HOLDING CO., a corporation duly organized and existing under and pursuant to the laws of the State of Washington, party of the first part, for and in consideration of the [132] sum of one dollar (\$1.00) lawful money of the United States,

and other good and valuable considerations to it in hand paid, at or before the ensealing and delivery of these presents by ALASKA MINES CORPORATION, a corporation duly organized and existing under and pursuant to the laws of the Commonwealth of Virginia, party of the second part, the receipt whereof is hereby acknowledged, has bargained, sold, assigned, conveyed, set over and transferred, and by these presents does bargain, sell, assign, convey, set over and transfer to the party of the second part, its successors and assigns, all of the assets, both real and personal, business, good-will, machinery, tools, appliances, fixtures, merchandise, bills and notes receivable, accounts receivable, choses in action and the benefit of all pending contracts, leases and options belonging to the party of the first part, and either located, in, earned by or in any way pertaining or relating to the business of the party of the first part hereto.

TO HAVE AND TO HOLD the same unto the said party of the second part, its successors and assigns forever, to and for its own proper use and behoof; subject, however, to two certain mortgages now liens thereon, securing the aggregate principal sum of three hundred thousand dollars (\$300,000) and interest at the rate of not exceeding seven per centum (7%) per annum.

And the said party of the first part does hereby constitute and appoint the party of the second part its true and lawful attorney, irrevocable, in its place, name and stead, for the purposes aforesaid, to ask,

demand, sue for, attach, levy, recover and receive all sum or sums of money which now are or may hereafter become due and owing and [133] payable for and on account of any of the accounts, dues, debts, and demands above assigned, hereby giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary, as fully to all intents and purposes as said party of the first part might or could do if personally present, with full power of substitution hereby ratifying and confirming all that said attorney, its substitute or substitutes, shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed, attested by its Secretary, in duplicate, the 15th day of August, one thousand nine hundred and sixteen.

NOME HOLDING CO.

By F. S. POWELL,  
President.

Attest:

[Corporation Seal] J. D. TRENHOLME,  
Secretary.

(Ex. "D"—2) (Revenue Stamp \$1.25.)

State of Washington,

County of —, —ss.

On this 15th day of Aug. A. D. 1916, before me, personally appeared F. S. Powell, to me known to



be the President of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my [134] hand and affixed my official seal the day and year first above written.

[Notarial Seal]

J. K. C. KELLOGG.

Recorded September 5, 1916, 4:00 P. M., at request of J. E. Powell.

JAMES FRAWLEY,

Recorder.

(Ex. "D"—3 ) Recorded Vol. 200, page 115.

**Exhibit "E" to Separate Answer of Alaska Mines Corporation.**

#64249.

THIS INDENTURE, made this 15th day of August, in the year one thousand nine hundred and sixteen, between NOME HOLDING CO., a corporation duly organized and existing under and pursuant to the laws of the State of Washington, party of the first part, and ALASKA MINES CORPORATION, a corporation duly organized and existing under and pursuant to the laws of the Commonwealth of Virginia, party of the second part,

WITNESSETH, That the said party of the first part, in consideration of the sum of one dollar

(\$1.00) lawful money of the United States, and other valuable considerations, paid by the said party of the second part, does hereby grant, release and quit-claim unto the said party of the second part, its successors and assigns forever, the following pieces or parcels of land in the Territory of Alaska, more particularly described as follows:

“CARNATION GROUP” situated on Wonder Creek.

“BONANZA ASSOCIATION CLAIM” situated at the east side of the City of Nome.

“ANDERSON CLAIM” situated on the west side of Bonanza Claim.

One-half interest in No. 4 Bench left limit of [135] No. 4 Below on Dry Creek.

Also five hundred and forty-two acres as follows:  
No. 1 Above on Wonder Creek.

Four claims, Jewel, Gold Dust, Lucky Two, No. 2 claim and Juanita, situated off the left limit of No. 13 Below on Dry Creek.

Combination Claim situated off No. 4 and 5 Below right limit Dry Creek.

Johnson Group approximately one-half interest in three claims situated off the left limit of No. 2 Above on Dry Creek, and described as Tibbets, Convex, and Concave, and also the Stockton Claim.

No. 5 Peluck.

No. 2 Tundra Claim, north of the Milk Ranch, east end of Nome.

Sheldon No. 2 off No. 2 Below on Wonder Creek.

Two lots and buildings, lots 10 and 11, Block 91.

'One lot and building, lot 40, Block 30, situated in the Town of Nome.

One office building and lots known as 28, 29 and 30 in Block 16, situated in the Town of Nome.

Six miles of ditches leading from headwaters of Dry Creek to the southern limits of the property, adjoining the City of Nome.

Being the same premises conveyed by E. E. Powell to Nome Holding Co. (therein described as Nome Holding Company), by a certain indenture bearing date the 25th day of October, 1915, and filed for record on said date.

TOGETHER *will* all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder [136] and remainders, rents, issues and profits thereof.

(Ex. "E"—2)      TO HAVE AND TO HOLD, the above-granted premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF the party of the first part has caused these presents to be executed by its President and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

NOME HOLDING CO.

By F. S. POWELL,

President.

[Corporation Seal]

Attest: J. D. TRENHOLME,

Secretary.

State of Washington,  
County of ———, —ss.

On this 15 day of Aug. A. D. 1916, before me personally appeared F. S. Powell, to me known to be the President of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal]

J. K. C. KELLOGG.

(Revenue Stamps \$25.00.)

Recorded September 5, 1916, 4:00 P. M. at request of J. E. Powell.

(Ex. "E"—3)

JAMES FRAWLEY,

Recorder.

Vol. 200, page 114.

Filed in the office of the District Court Clerk of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk. [137]

Whereupon the court adjourned to 10 A. M. September 7th, 1917, and,

BE IT FURTHER REMEMBERED that upon the convening of court on September 7th, 1917, at 10 A. M., the Court regularly took up the matter of the hearing on the application of the plaintiff for



a receiver in the above-entitled action, and the defendant, Alaska Mines Corporation, thereupon offered in evidence the affidavit of E. E. Powell, which affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of E. E. Powell—September 4, 1917.**

(Title of Court and Cause.)

United States of America,

Territory of Alaska,—ss.

E. E. Powell, being first duly sworn, deposes and says:

That in the month of September, 1914, affiant was and had been for several years prior thereto manager of the Nome Consolidated Dredging Company.

That on the 14th day of September, 1914, the said Nome Consolidated Dredging Company was indebted to the Alaska Banking & Safe Deposit Company in the sum of \$5,889.66, which was long past due and was also indebted in large sums of money to divers other persons, firms and corporations. That on said 14th day of September, 1914, for the purpose of paying said indebtedness to said Alaska Banking & Safe Deposit Company, and also borrowing further moneys from said bank, affiant, having been theretofore duly authorized by the Board of Directors of said Nome Consolidated Dredging Company, made, executed and delivered to one F. H. Thatcher, trustee, a certain mortgage and trust deed referred to in the plaintiff's complaint herein as the "Thatcher Mortgage," [138] to secure a series of notes of the principal sum of \$25,000, bearing interest

from date, some at the rate of 12% per annum, some at the rate of 8% per annum, and some at the rate of 6% per annum; that said notes were in various denominations, and were on said 14th day of September, 1914, duly certified by said trustee; that the principal sum of said several notes and the respective payees thereof, were as follows:

Number. Payable to the order of: Principal sum.

1	Alaska Banking & Safe Deposit Co.	\$ 500.00
2	ditto	793.13
3	ditto	3500.00
4	ditto	1000.00
5	ditto	1000.00
6	ditto	444.83
7	Nome Consolidated Dredging Company	500.00
8	ditto	500.00
9	ditto	500.00
10	M. W. Newton	500.00
11	ditto	500.00
12	ditto	500.00
13	J. W. Olford	500.00
14	L. H. Eisenlohr	500.00
15	E. L. Webster	500.00
16	E. L. Webster	500.00
17	Nome Consolidated Dredging Co.	262.04
18	Alaska Banking & Safe Deposit Co.	2944.83
19	M. W. Newton	500.00
20	ditto	500.00
21	ditto	500.00
22	ditto	500.00
23	L. H. Eisenlohr	500.00

182      *American Manganese Steel Company*

24	E. L. Webster	500.00
25	ditto	500.00
26	Nome Consolidated Dredging Co.	500.00
27	ditto	500.00
28	ditto	500.00
29	ditto	500.00
30	ditto	500.00
31	ditto	500.00
32	ditto	500.00
33	ditto	500.00
34	ditto	500.00
35	ditto	500.00
36	ditto	500.00
37		555.17

That said note, numbered one, with the certificate of the trustee thereon, was in words and figures as follows, to wit:

“\$500.00.                      Nome, Alaska, Sept. 14, 1914.

On or before December 15, 1914, we promise to pay to the order of the Alaska Banking & Safe Deposit Company, Five Hundred Dollars, at the banking house of the Alaska Banking and Safe Deposit Company, Nome, Alaska, without defalcation, for value received, with interest from date at the rate of 12 per cent per annum, principal and interest payable only in United States Gold Coin.

This note is secured by a certain mortgage bearing date the 14th day of Sept., 1914, executed and delivered by Nome Consolidated Dredging Company, to F. H. Thatcher, as Trustee, and secured upon the property and rights in said mortgage described, which mortgage is to be recorded at Nome, Alaska, and to which reference is hereby made for a full

description of said property, and the terms and conditions upon which this note is issued.

NOME CONSOLIDATED DREDGING COMPANY.

By E. E. POWELL,

No. 1. Vice-president & General Manager.

I hereby certify that the above note is one of an authorized issue, aggregating Twenty-five Thousand Dollars (\$25,000) mentioned in a certain mortgage dated the 14th day of September, 1914, referred to therein.

F. H. THATCHER, Trustee." [140]

That all the other notes were similar in form, and a portion of said issue was due December 15th, 1914, and a portion December 15th, 1915.

That on the 15th day of September, 1914, the said Nome Consolidated Dredging Company borrowed from the Alaska Banking & Safe Deposit Company \$10,182.79, and then and there delivered to said bank, as evidence of said indebtedness, of the notes above mentioned, Numbers 1, 2, 3, 4, 5, 6 and 18.

That the said Nome Consolidated Dredging Company used of said sum so borrowed, the sum of \$5,-889.66, to take up two promissory notes of said Nome Consolidated Dredging Company, then held by said Alaska Banking & Safe Deposit Company, and the balance of said money was used by said Nome Consolidated Dredging Company, in the ordinary course of its business, to pay sundry creditors and expenses.

That note No. 7 of said series, originally made payable to the Nome Consolidated Dredging Com-



pany, was shortly thereafter duly endorsed by said Nome Consolidated Dredging Company, and delivered to the Darling & Dean Company, merchants of Nome, Alaska, in payment of a *bona fide* indebtedness due from said Nome Consolidated Dredging Company, to said Darling & Dean Company. That thereafter, and in the month of June, 1915, affiant personally purchased said note from said Darling & Dean Company, and thereafter continued to hold the same as his own personal property.

That note No. 8 of said series was shortly after its issuance endorsed by said Nome Consolidated Dredging Company, and delivered to one, Geo. D. Schofield, in part payment to him of a then existing *bona fide* indebtedness, and thereafter and in the month of November, 1914, affiant purchased said note from said Schofield, and has since continued to own the same. [141]

That note No. 9 of said series was, shortly after its issuance, endorsed by the Nome Consolidated Dredging Company, and delivered to one W. H. Webb, a merchant of the city of Nome, in part payment of then *bona fide* existing indebtedness due from said Nome Consolidated Dredging Company to W. H. Webb;

That notes Nos. 10, 11, 12, 19, 20, 21 and 22 of said series were made payable to M. W. Newton, a resident of the city of Philadelphia, Penn'a, and were thereafter delivered to him and are now owned by him, and said notes were so delivered to said Newton in part payment of then existing *bona fide* indebtedness of said Nome Consolidated Dredging Company

to said M. W. Newton, for money theretofore borrowed by said company from said Newton.

That note No. 13 of said series was made payable and issued and delivered to one J. W. Olford, of the city of New York, in payment of then existing *bona fide* indebtedness from said Nome Consolidated Dredging Company to said Olford, for money theretofore borrowed by said company from said Olford, and that said Olford is still the owner and holder of said note.

That notes Nos. 15, 16, 24 and 25 of said series, were issued and delivered to one E. L. Webster, in payment of *bona fide* and existing debts then due from said company to said E. L. Webster, for money theretofore borrowed by said company from said Webster; that said Webster is still the owner and holder of said notes.

That notes Nos. 17, 26, 27, 28, 34 and 37 of said series, originally made payable to the Nome Consolidated Dredging Company, were, within a few days after the same were issued, endorsed by said Nome Consolidated Dredging [142] Company, and delivered to the Associated Oil Company of California, in part payment of *bona fide* and existing indebtedness then due from said Nome Consolidated Dredging Company to said Associated Oil Company, for fuel oil theretofore delivered by said Associated Oil Company to said Nome Consolidated Dredging Company. That said notes were owned and held by said Associated Oil Company until the same were purchased by one Henry L. McCoy, of the city of Philadelphia, who has ever since continued to be

and now is the owner and holder thereof.

That note No. 23 of said series was issued and was payable to L. H. Eisenlohr, and delivered to him in part payment of then existing *bona fide* indebtedness of said Nome Consolidated Dredging Company to said L. H. Eisenlohr, for money theretofore borrowed by said company from said Eisenlohr.

That notes Nos. 29, 30 and 37 of said series were, shortly after the date of the issuance thereof, endorsed by said Nome Consolidated Dredging Company, and delivered to one Geo. D. Schofield, in payment of then existing *bona fide* indebtedness of said Nome Consolidated Dredging Company, to said Schofield, and said Schofield continued to hold said notes until some time in the month of October, 1915, when the same were purchased by affiant from said Schofield, and affiant is the owner and holder of the same.

That note No. 32 of said series, originally issued to said Nome Consolidated Dredging Company, was shortly after the issuance of the same, endorsed by said company and delivered to H. H. Moller, a merchant of the city of Nome, Alaska, in part payment of *bona fide* and existing indebtedness of said Nome Consolidated Dredging Company to said H. H. Moller; that prior to the foreclosure of said trust [143] mortgage said note was purchased by affiant, personally, from said H. H. Moller, and affiant ever since has continued to hold and own the same.

That note No. 35 of said series was, shortly after its issuance, endorsed and delivered to one, J. M. Sloan, in payment of *bona fide* and existing indebted-

ness of said Nome Consolidated Dredging Company to said Sloan, and a few days thereafter the same was purchased from said Sloan by affiant, personally, but said note was afterwards delivered to the Associated Oil Company in part payment of a then *bona fide* existing indebtedness of said Nome Consolidated Dredging Company to said Associated Oil Company, and said note was thereafter purchased and is now owned by one Henry L. McCoy, a resident of Philadelphia, Penn'a, as aforesaid.

That note No. 36 of said series was, shortly after its execution, endorsed and delivered to one J. M. Sloan for payment of *bona fide* existing indebtedness of said Nome Consolidated Dredging Company to said J. M. Sloan, who has continued to be and now is the owner and holder thereof.

Affiant further says that each and every one of said notes was issued, endorsed and delivered by said Nome Consolidated Dredging Company for an actual, *bona fide* existing debt of said Nome Consolidated Dredging Company, which existed prior to the 15th day of September, 1914, save and except the notes delivered to the Alaska Banking & Safe Deposit Company for money contemporaneously borrowed and also excepting note No. 36, which was issued, endorsed and delivered to J. M. Sloan for money contemporaneously borrowed.

That each and every one of said notes were so issued, sold and delivered for full value, dollar for dollar, although in many instances the said Nome Consolidated Dredging Company [144] was further heavily indebted to the various persons and



corporations who received said notes.

That affiant has read the complaint of the plaintiff in this action, and that the statements on page (4) of said complaint referring to said notes and alleging that in truth and in fact all of said notes were delivered and held by the defendant, E. E. Powell, for the purposes thereafter in said complaint set forth and alleged, are wholly untrue.

That the following statement contained on page (4) of said complaint:

“\* \* \* that the said Alaska Banking & Safe Deposit Company was paid in full by defendant E. E. Powell, as general manager of the defendant Nome Consolidated Dredging Company, all money, sums and amounts so secured by said Thatcher mortgage, long prior to the commencement of the foreclosure of said mortgage hereinafter set forth \* \* \* ”

is wholly untrue. That it is true that at the time of the foreclosure and sale referred to on said page (4), said Nome Consolidated Dredging Company was no longer indebted to said bank on account of said notes, but this was only because said notes had been theretofore purchased from said bank by one R. G. Cunningham, who was then and there the owner and holder of all of said notes originally delivered to said bank.

Affiant denies that said “Thatcher Mortgage” referred to in the plaintiff’s complaint, or the “Sloan Mortgage” referred to therein, was executed by the Nome Consolidated Dredging Company, or by him, as its vice-president and general manager, with any

intent to defraud any of its creditors, or with any intent to prefer any of the officers, agents or stockholders as against the plaintiff in this action.

That affiant has read paragraph IV of plaintiff's complaint and that the allegations contained therein are wholly false.

That affiant has read paragraph V of the plaintiff's [145] complaint, and alleges that in the month of September, 1914, the Nome Consolidated Dredging Company was in need of funds to further conduct its business, but as to whether or not it was wholly insolvent is a matter of opinion; that said company had a large amount of property, which had an earning capacity when in operation, but the actual cash value of its property was difficult to accurately estimate. That affiant had full knowledge of the actual condition of said company at said time, but affiant says that the allegations of said paragraph V of said complaint reading as follows:

“ \* \* \* the aforesaid E. E. Powell while acting as vice-president and general manager of the said defendant Nome Consolidated Dredging Company, then and there planned, schemed and conspired with said M. W. Newton, Louis Eisenlohr, E. L. Webster, and the Alaska Dredging Company to fraudulently prefer each of them to other creditors of said Nome Consolidated Dredging Company and particularly as against this plaintiff; that in pursuance of said plan, scheme and conspiracy said defendant E. E. Powell caused said Thatcher mortgage and said Sloan mortgage to

be made, executed, delivered and recorded, thereby intending to cover all real and personal property belonging to the Nome Consolidated Dredging Company with liens to prevent this plaintiff, an unsecured creditor, from recovering its just claim from the assets of said debtor company.”

is wholly and entirely false.

Affiant further denies that the suit referred to in paragraph VI of the plaintiff's complaint was brought pursuant to the scheme mentioned therein, or pursuant to any scheme whatsoever, other than to foreclose said mortgage in a lawful manner.

Affiant says that the allegation—

“ \* \* \* that immediately after said suit was commenced by said Powell he thereupon, as general manager of said defendant, Nome Consolidated Dredging Company, employed an attorney who appeared and filed an answer in said cause”—

is wholly untrue. And affiant denies that he acted for all the parties or directed all the proceedings in said cause, in conformity with any scheme, plan or conspiracy to defraud any of the creditors of the Nome Consolidated Dredging Co. [146] Affiant says that the decree in said cause was prepared partly by Geo. D. Schofield, who was himself one of the plaintiffs in said cause. Affiant denies that as part or parcel of any scheme or conspiracy he caused his attorney to prepare said decree so that any spurious or worthless notes could be used by him in bidding in the assets at the marshal's sale, or that he did any-

thing to prevent any *bona fide* bidders from bidding at said sale, or that in conformity with any scheme or conspiracy he bid in the property mentioned in said complaint.

Affiant denies that he used any spurious or worthless notes, under the terms of said decree, or otherwise, in paying for his bid at said sale.

Affiant further says that he purchased said property at said sale in his own name, but in trust for himself and the holders and owners of said notes, but denies that he took title at said sale for the use or benefit of any stockholder or stockholders of said Nome Consolidated Dredging Company, as such, or with intent to hinder, delay and defraud the plaintiff, or any other creditor, of said company.

Affiant denies that he organized, or caused to be organized the Nome Holding Company, in pursuance of any such scheme or plan as referred to in plaintiffs' complaint, or that thereafter the defendants Newton, Eisenlohr, Webster, Alaska Dredging Company, and affiant, or any of them, in conformity with the scheme mentioned in the plaintiff's complaint, organized the defendant, Alaska Mines Corporation; and affiant denies that the defendant, Alaska Mines Corporation, at any time had full or any knowledge of any of the alleged matters set forth in the plaintiff's complaint, other than such knowledge as might be obtained from the United States Commissioner and Recorder's Office at Nome, Alaska. [147]

Affiant denies that he or any of the parties mentioned in plaintiff's complaint perpetrated any fraud



upon the plaintiff and other creditors, or upon any of the stockholders of the Nome Consolidated Dredging Company, and denies that all or any of the stock of said "New Concern" if by said "new concern" was intended to be meant the Alaska Mines Corporation, or the Nome Holding Company, was subscribed and divided between any schemers or conspirators.

Affiant says with reference to the filing in the office of the clerk of the above-entitled court, a paper marked Exhibit "C," attached to plaintiff's complaint, that he has no recollection of having filed or causing the same to be filed; that said document purports to have been signed and sworn to by affiant, in the city of Seattle, Washington, on the 8th day of October, 1915, but that on said 8th day of October, 1915, affiant was not in said city of Seattle, Washington but was in the city of Nome, Alaska, having been here during the entire summer season and affiant did not leave Nome, Alaska, until on or about November 1st, of said year, That said statement was prepared in the office of said Nome Consolidated Dredging Company, in said city of Seattle, but was not prepared under affiant's supervision, and contained, as affiant verily believes, a true statement of the debts and liabilities of said company according to the books of account of said company which were in its said office in the city of Seattle. At the time that said statement was prepared it is evident that no notations had been made on the books of said company of the notes secured by the Sloan mortgage, referred to in plaintiff's complaint, although said notes had theretofore been executed and delivered, as hereinafter alleged. But

affiant denies that he conspired [148] and conducted said foreclosure proceedings in such a way and manner by the use of any spurious or worthless notes, or otherwise, so that all of said assets were confiscated by him and subsequently assigned and transferred to the defendant, Alaska Mines Corporation, in fraud of the rights of this plaintiff.

Affiant admits that after the sale of the assets of the Nome Consolidated Dredging Company under the foreclosure decree, he did take possession of said property and held the same for a certain time, as trustee for himself and the other owners of said notes, but alleges that there were no net proceeds of the mining operations for the year 1915.

Affiant denies that the Alaska Mines Corporation was organized by the defendants, M. W. Newton, Louis Eisenlohr, E. L. Webster, Alaska Dredging Company, and affiant, or that said corporation ever had any knowledge or notice of the rights of the plaintiff as a creditor of the defendant, Nome Consolidated Dredging Company.

Affiant further says that none of the property now in the possession of the Alaska Mines Corporation is being worn or depreciated, or that it will be rendered valueless for many years, but, on the contrary, the same has been and now is being rebuilt and refitted and large additions are being made thereto at great expense.

Affiant denies that the Alaska Mines Corporation threatens to dispose of any of the property mentioned in the plaintiff's complaint, but admits that it refuses to recognize any right, title or interest therein by the

Nome Consolidated Dredging Company.

Affiant further denies that in order to preserve or protect the property mentioned in the plaintiff's complaint herein *pendente lite*, it is necessary for the Court to [149] appoint a receiver to take possession of any of said assets, real or personal.

Affiant further says that on the 16th day of September, 1914, the Nome Consolidated Dredging Company, acting by affiant as Vice-president and General Manager, by authority of its Board of Directors, made, executed, and delivered to one, J. M. Sloan, as Trustee, a certain trust deed and mortgage, referred to in the plaintiff's complaint as the "Sloan Mortgage," conveying and transferring all the real and personal property of said Nome Consolidated Dredging Company, as security for the payment of a series of promissory notes, aggregating the sum of \$200,000, numbered from one to seventy, consecutively; that said promissory notes were executed by the said Nome Consolidated Dredging Company, and certified by the trustee mentioned in said mortgage, and thereafter four of said notes, numbered 1, 34, 64 and 65 were made payable to and delivered to Louis Eisenlohr, and aggregated in amount the principal sum of \$21,500.00; that notes numbered 35, 36, 37, 38, 39, 40, 49, 50, 58, 59, 60, 61, 62, and 63, were made payable to and delivered to M. W. Newton, and were of the principal sum of \$55,000.00; that the remainder of said notes were made payable to and delivered to the Alaska Dredging Company, and were of the principal sum of \$123,500.00. That at and prior to the execution and delivery of said notes de-



scribed to said L. H. Eisenlohr, the said Nome Consolidated Dredging Company, was indebted to the said Eisenlohr, for moneys theretofore borrowed by said company from said Eisenlohr, and moneys expended by said Eisenlohr for the use and benefit of said company, in a sum largely in excess of \$21,500.00, and said notes were made and delivered to said Eisenlohr, in part [150] payment of a *bona fide* existing debt then due and owing from said Nome Consolidated Dredging Company to said Eisenlohr; that at and prior to the execution and delivery of said notes above described to M. W. Newton, the said Nome Consolidated Dredging Company was indebted to the said Newton, for moneys theretofore borrowed by said company from said Newton and moneys expended by said Newton for the use and benefit of said company, in a sum largely in excess, of \$55,000.00, and said notes were made and delivered to the said Newton in part payment of a *bona fide* existing debt then due and owing from said Nome Consolidated Dredging Company to said Newton; that at the time said notes above mentioned were delivered to said Alaska Dredging Company, amounting in the aggregate to the principal sum of \$123,500.00, that Nome Consolidated Dredging Company was actually indebted to said Alaska Dredging Company, and to other persons whose claims were held by said Alaska Dredging Company, in trust for the owners thereof, in a sum of money largely in excess of \$123,500.00 and said notes were so executed and delivered to said Alaska Dredging Company, in payment of then existing *bona fide* debts due from said Nome Con-



solidated Dredging Company to said Alaska Dredging Company and other persons, whose claims were held by said Alaska Dredging Company in trust for the use and benefit of the various holders thereof, in a sum exceeding \$123,500.00.

That all of said notes so issued and secured by the said "Sloan Mortgage," so-called, were issued and delivered in payment of *bona fide* existing debts of said Nome Consolidated Dredging Company, and were issued for full value, dollar for dollar, and more. [151]

Affiant says that he has heard read the affidavit of William A. Gilmore, made herein on July 10, 1917, and knows the contents thereof. That the statement in said affidavit—

"That affiant was personally present at the said sales and knows that one Jafet Lindeberg, a wealthy resident of Nome, Alaska, was present at said sales intending to bid thereat, but was prevented from bidding on the sale of said assets by reason of the use by the said defendant E. E. Powell, of the said spurious notes referred to in plaintiff's complaint"—

is untrue. That affiant was personally present at the time said property was first offered for sale by the said United States marshal, under the execution referred to in the complaint herein, in said foreclosure suit. That said Lindeberg was then present and stated that if the sale was postponed to enable him to examine the property to be offered for sale he would be prepared to make a large and substantial bid or bids therefor. That thereupon, said United

States marshal did postpone the sale of all of the property covered by said mortgages and the decree of foreclosure thereof, save and except a small amount of furniture and fixtures, for the period of 48 hours, and thereafter at the time of such postponed sale said Lindeberg was present, but did not make any bid for any portion of said property, although the same was offered in a large number of separate parcels; that said Lindeberg was not prevented from bidding any amount he might wish to offer for any or all of such property at such sale for the reasons mentioned in the affidavit of said Gilmore, or any other reasons whatsoever.

Affiant further says that the statement contained in the affidavit of said Gilmore that he overheard this affiant admit that he had procured the decree of foreclosure mentioned in said complaint, to be prepared by his attorneys and under the supervision of his attorneys, so [152] that he could use the notes mentioned therein to prevent *bona fide* bidders from bidding at said sale, is untrue.

Affiant further says that the mortgages mentioned and described in the plaintiff's complaint as the "Thatcher Mortgage" and the "Sloan Mortgage" were in fact made for the purpose of securing the various persons to whom the notes described therein were made payable, or to whom they were endorsed and delivered, and who were *bona fide* creditors of the Nome Consolidated Dredging Company; that affiant may have stated said fact and that it was affiant's intention to organize a company to take the title to said property for the benefit of said security

holders, and affiant may have admitted said fact also, at some time.

It is also true that affiant, long after the execution of said mortgages, but prior to the foreclosure thereof, had possession, as trustee for the owners thereof of the several notes secured by said respective mortgages, and at the time of said sale affiant had in his possession, as trustee, for the respective holders of all the notes mentioned and described in the "Sloan Mortgage" and all the notes mentioned and described in the "Thatcher Mortgage" with the exception of three notes of the denominations of Five Hundred Dollars each, and possession of said three notes he obtained afterwards, endorsed in blank, before settling with the United States marshal. But affiant says that if it is intended by said affidavit to be intimated or inferred that the admissions therein referred to were made prior to the execution of either of said mortgages, or prior to the foreclosure thereof and the sale of said property under said execution, then said affidavit in that respect is untrue; and further, that if it is intended to be understood or inferred [153] from said affidavit that said mortgages were executed pursuant to any plan or scheme to defraud any person or persons, either the plaintiff herein, or any creditor or stockholder of the Nome Consolidated Dredging Company, said affidavit, in that respect is untrue.

Affiant further says with respect to the "Thatcher Mortgage," that the making and execution thereof was not thought of or contemplated until within a few days immediately prior to the time when the

same was in fact executed and the notes described therein executed, certified, issued and delivered to the respective holders; that said "Thatcher Mortgage" was executed, and the notes thereunder certified and delivered, as hereinbefore stated, primarily for the purpose of procuring further moneys from said Alaska Banking & Safe Deposit Company, to meet the immediate and urgent requirements of said Nome Consolidated Dredging Company, and because said Alaska Banking & Safe Deposit Company would not loan or advance to said Nome Consolidated Dredging Company, further money or moneys without adequate security.

Affiant further says with respect to the amounts bid by him at the marshal's sale referred to in said affidavit and the plaintiff's complaint herein filed, that the only reason why affiant did not bid in the various items of personal property and the real estate mentioned in plaintiff's complaint, at a greater price, was because of the large amount of money, necessary in such event, to be paid to said United States marshal as commission on said sale.

Affiant further says with respect to the organization of the Alaska Mines Corporation, that neither affiant nor said Eisenlohr, or Newton, or any person or persons connected with the Nome Consolidated Dredging Company, as [154] stockholders, or in any other way, were among the original incorporators of said Alaska Mines Corporation, but that shortly after the organization of said company the number of directors therein was increased to seven; that affiant, said Eisenlohr, and said Newton, became



the owners of one share each of the capital stock of said corporation and were elected as directors and qualified as such; that on or about said time four other persons were elected directors of said Alaska Mines Corporation, none of whom was ever at any time a stockholder or interested in said Nome Consolidated Dredging Company; that said board of directors, as thus constituted, consisted of the following persons.

James Gayley, of the City of New York; T. Crane, of the City of New York; August Heckshere of the City of New York; H. B. Livingston, of the City of New York; M. W. Newton, of the City of Philadelphia; Louis Eisenlohr, of the City of Philadelphia, and E. E. Powell, of Seattle, Washington.

That said persons last above named, have ever since continued to be and now are the directors of said Alaska Mines Corporation.

Affiant further says that the property sold under said foreclosure sale and described in the plaintiff's complaint, was sold and transferred by the Nome Holding Company, to the Alaska Mines Corporation in exchange for 3,701,820 fully paid-up shares of the capital stock of said Alaska Mines Corporation; thereupon said Nome Holding Company, by deed and bill of sale, transferred said property to said Alaska Mines Corporation. That at the time of the said sale and transfer of said property the seven persons above named were and constituted the board of directors of said Alaska Mines Corporation, and said board on behalf of said [155] Alaska Mines Cor-

poration made and approved the purchase of said property.

E. E. POWELL.

Subscribed and sworn to before me this 4th day of September, 1917.

[Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

Filed in the office of the Clerk of the District Court, of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk.

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of J. H. Miles, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of J. H. Miles—September 4, 1917.**

(Title of Court and Cause.)

United States of America,  
Territory of Alaska,—ss.

J. H. Miles, being first duly sworn, says:

That he is a mining engineer by profession and is a member of the American Institute of Mining Engineers; that for the past fourteen years he has made gold dredging a specialty and has, during said period, *operating* dredges in California, Idaho, Montana and Alaska; that during the month of August, 1916, affiant was employed by the Alaska Mines Corporation, to go to Nome, Alaska, and to make an examination of the properties of said Alaska Mines Corporation and to report thereon.

That affiant came to Nome, in said month of August, 1916, and made a careful examination of the properties of said Alaska Mines Corporation within the Nome Mining District, Territory of Alaska; that thereafter and on or about the month of January, 1917, affiant was employed by the said Alaska Mines Corporation [156] as General Superintendent in charge of the dredging operations of said company in Alaska.

That affiant thereafter came to Nome over the winter trail, arriving about the 16th day of April, 1917, and that he thereafter immediately took charge of the property of said company.

That the property of said company consisted of placer mining claims in the Nome District, a Power Plant on Bourbon Creek, one Dredge situated on Bourbon Creek, known as No. 2; one dredge situated on Wonder Creek known as Dredge No. 1; the hull of a dredge situated on Flat Creek and known as Dredge No. 3; buildings in Nome, automobiles and miscellaneous mining machinery and equipment; that said Power Plant situated on Bourbon Creek, when affiant examined the same in August, 1916, and until the same was repaired as hereinafter stated, in 1917, was badly out of repair and in a run-down condition and wholly unfit for operation; that since affiant took charge of said power plant for the said Alaska Mines Corporation, the same has been completely and thoroughly overhauled and repaired and is now in a good operating condition; that said Alaska Mines Corporation necessarily expended in overhauling and repairing said Power Plant and placing the same in

condition so that it could be operated, over the sum of Three Thousand Dollars.

That prior to the time affiant took charge of said Power Plant and overhauled and repaired the same, said power plant consumed about sixty-five barrels of crude oil per day in generating electricity; that since affiant repaired and overhauled said power plant said power plant consumes twenty-six barrels of oil per day, generating approximately the same electrical power; that said power plant in said present condition, is worth not less than the sum of forty thousand dollars.

That said Dredge on Bourbon Creek known as Dredge No. 2, [157] was, when affiant took charge of the properties of said company, badly run down and out of repair, and was in such general bad condition that the same was unfit for operation and could not be economically operated or operated at a profit upon said Bourbon Creek. That the screen upon said dredge was unfit for use and affiant, since taking charge of the same, has removed such screen and replaced it with a screen of modern type; also placed upon said dredge a new conveyor belt and replaced worn out pieces in the winch of said dredge, and has generally overhauled and repaired said dredge at an expense of about twenty-four thousand dollars;

That said dredge is a seven cubic-foot bucket dredge and is electrically operated from power obtained from said power plant on Bourbon Creek; that said dredge is now in first-class condition and is of the value of not less than one hundred and twenty-five thousand dollars, and could not be duplicated for



less than that amount. That said dredge is now being actively operated, upon said Bourbon Creek.

That the dredge situated on Wonder Creek known as Dredge No. 1 was sunk when affiant took charge of the properties of said Alaska Mines Corporation, and was a total wreck, and outside of some of the electrical machinery, pumps and a small amount of timber, said dredge was of no value except as scrap; that all parts of such dredge having any value have been preserved and is now possessed by the Alaska Mines Corporation.

That the dredge hull situated on Flat Creek and called Dredge No. 3 was purchased by the Alaska Mines Corporation from one Ewing; that said dredge hull when affiant took possession of the properties of said Alaska Mines Corporation, was of the value not to exceed forty thousand dollars; that such dredge hull was too small for the type of machinery to be installed therein and the same had to be reconstructed and enlarged. [158]

That the said Alaska Mines Corporation purchased machinery to be installed in the said dredge hull on Flat Creek and the same has now been installed and said dredge is now completed and actively operating on said Flat Creek.

That the said Alaska Mines Corporation has expended in the reconstruction and enlarging of said dredge hull, and in the purchasing, transporting and installing of the machinery thereon, the sum of about one hundred thousand dollars.

That since the purchase of the machinery on such dredge, prices have advanced to such an extent that

said dredge is now of the value of over two hundred thousand dollars, and said dredge could not be duplicated for less than that amount.

That the dredge situated on Holyoke Creek and known as Dredge No. 4, belonging to the Alaska Mines Corporation, was purchased by said corporation from one Greenberg; that the same when purchased, consisted of a hull of the value of about forty thousand dollars.

That since said purchase of said hull by the said Alaska Mines Corporation, the Alaska Mines Corporation has purchased machinery to install in said dredge and have reconstructed the said hull of said dredge and are now installing machinery therein.

That said Alaska Mines Corporation has expended about the sum of one hundred and fifteen thousand dollars in the reconstruction of said dredge hull and for machinery to be installed therein; that said dredge will be completed and ready for operation in about thirty days.

That the prices of machinery has materially advanced since the purchase of machinery for said last-named dredge, and the said dredge when completed will be worth at least two hundred thousand dollars, and could not be duplicated [159] for a less amount.

That since affiant took charge of the properties of said Alaska Mines Corporation it has established a camp on Flat Creek at a cost of not less than three thousand dollars.

That the said Alaska Mines Corporation is now employing thirty-six men for the carrying on of its

operations in the Nome District.

That said dredge on Flat Creek and the said dredge on Bourbon Creek are the only dredges of the Alaska Mines Corporation now being actually operated; that said dredges have been operating for a few days and that no gold has been cleaned up from either of said dredges up to the present time.

That no active mining has been done by said Alaska Mines Corporation since affiant has been its general superintendent, except the operation of said last-named dredges for the past few days.

That none of the property of the said Alaska Mines Corporation has been or is being materially injured or impaired, but on the contrary the value of said properties of said Alaska Mines Corporation have been materially enhanced by reason of the repairs and improvements hereinbefore enumerated.

J. H. MILES.

Subscribed and sworn to before me this the 4th day of September, 1917.

[Seal]

O. D. COCHRAN,

Notary Public in and for the Territory of Alaska.

(My commission expires on the 4th day of August, 1919.)

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Alaska. Sep. 4, 1917. G. A. Adams, Clerk.

Thereupon the defendant, Alaska Mines Corporation, then [160] offered in evidence the affidavits of H. S. Thompson, which said affidavits were read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of H. S. Thompson—August 15, 1917.**

(Title of Court and Cause.)

United States of America,  
Territory of Alaska,—ss.

H. S. Thompson, being first duly sworn, deposes and says:

That he is and has been since the 15th day of May, 1917, Auditor and Assistant Treasurer of the Alaska Mines Corporation, one of the defendants in the above-entitled action; that said corporation was organized in the month of June, 1916; under the laws of the State of Virginia, and has since the fall of 1916, been engaged in business at Nome, Alaska.

That on the 15th day of August, 1916, said Alaska Mines Corporation acquired by purchase from the Nome Holding Company, a corporation organized and existing under the laws of the State of Washington, a large number of placer mining claims, and interests therein, and leases and options on various other placer mining claims situate in the Cape Nome Recording District, Territory of Alaska; that on the same date the said Alaska Mines Corporation, acquired by purchase from said Nome Holding Company, a large amount of personal property, including a power plant on Bourbon Creek, a gold placer dredge known as Bourbon dredge or No. 2 dredge, all situated on Bourbon Creek; a placer dredge known as No. 1 dredge, situated on Wonder Creek and also known as the Wonder Dredge, and a large quantity of placer mining tools and equipment.



That said Alaska Mines Corporation did, on or about the 20th day of November, 1916, acquire, by purchase, an uncompleted dredge known as No. 3 Dredge, situated on Flat Creek.

That said Alaska Mines Corporation has also since said date, acquired, by purchase, a number of other placer mining claims and interests therein, situated in said Cape Nome Recording District, Territory of Alaska.

That on or about the 17th day of April, 1917, said Alaska Mines Corporation acquired, by purchase, from one H. Greenberg, fifty-one per cent interest in placer claim No. 2 on Holyoke Creek, and an uncompleted dredge situated thereon known as No. 4 Dredge; that said interest in said claim and said dredge is subject to an unpaid mortgage indebtedness of \$35,000.00.

That since the Alaska Mines Corporation acquired the property above enumerated and described, it has expended large sums of money in repairing, completing and equipping said dredges, some of the particulars of which are as follows:

That said company sent J. H. Miles, its General Superintendent, from Seattle, Washington, over the trail to Nome, Alaska, where he arrived on or about April 6, 1917, and immediately took charge of the property of said company and commenced to put the same in shape for operation.

That said Alaska Mines Corporation has actually paid out for machinery for its No. 3 Dredge, above mentioned, the sum of \$51,500.00; that this machinery has all been delivered, and that in addition

thereto said Alaska Mines Corporation has paid the sum of \$10,000, freight on said machinery. That said dredge is an eight and a half cubic [162] foot, close connected, bucket dredge, electrically operated, and when completed in the manner above indicated, cannot be duplicated for and is worth not less than \$200,000.00.

That said Alaska Mines Corporation has actually paid for machinery for its No. 4 Dredge, a portion of which has arrived, and for the remainder of which the company holds bills of lading, the sum of \$74,300.00, exclusive of freight charges. That said machinery is now being installed, and when completed said dredge cannot be duplicated for and is actually worth not less than \$200,000.00. That said No. 4 Dredge is an eight and a half cubic foot, close connected, bucket dredge, electrically operated.

That said Alaska Mines Corporation is now actively engaged in repairing and placing in working order the dredge known as Bourbon Creek dredge, or No. 2 dredge, situate on Bourbon Creek, in said Cape Nome District, installing thereon a new type of screen and making other alterations and repairs; that said No. 2 dredge is a seven cubic foot bucket dredge, electrically operated, and when refitted and repaired, in the manner above indicated, cannot be duplicated for and will be worth not less than \$100,000.00. That said dredge is situated on ground leased from the Anvil Hydraulic & Drainage Company.

That said Alaska Mines Corporation is also the owner of a large power plant situate on Bourbon

Creek in said Cape Nome District, capable of generating sufficient electric power to operate said three dredges; that said plant and the machinery therein, has been refitted and repaired by said company during the present spring and summer at great expense, and is now in running order and capable of developing 1,000 horse power electric energy. That said power plant in its present condition cannot be duplicated for and is worth not [163] less than \$40,000.00.

Affiant further says that it is the intention of said company to completely equip and place in running order said three dredges in the Nome District, during the present season, and thereafter operate the same by electric power from said plant.

That said Alaska Mines Corporation has since the months of May and June, and is now directly employing from 30 to 50 men daily, and when said dredges are equipped will employ in operating the same and the power house above mentioned, an average of 30 men daily.

That said Alaska Mines Corporation has actually disbursed, up to the present time, in the making of said improvements, the sum of \$60,000, exclusive of the amounts hereinbefore stated.

That said company has not up to the present time done any actual mining or extracted any placer gold from any placer claim belonging to it, or held under lease or option by it.

That said Alaska Mines Corporation was organized with a capital stock of \$10,000,000.00, divided into 10,000,000 shares of the par value of \$1.00 each,

of which amount at least the number of 3,781,000 shares of said stock have actually been issued. That the stock of said Alaska Mines Corporation has been actively dealt in on the New York curb market, and a large number of shares are there bought and sold daily to the public generally, and said stock had a market value at the last report received in the month of July, 1917, of 75 cents per share.

H. S. THOMPSON.

Subscribed and sworn to before me this 15th day of August, [164] 1917.

[Seal]

G. J. LOMEN,

Notary Public, Territory of Alaska.

My commission expires June 27, 1921.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sep. 4, 1917.  
G. A. Adams, Clerk.

**Affidavit of H. S. Thompson—September 4, 1917.**

(Title of Court and Cause.)

United States of America,

District of Alaska,—ss.

H. S. Thompson, being first duly sworn, deposes and says:

That he is the Auditor and Assistant Treasurer of the defendant, Alaska Mines Corporation; that on the 15th day of August, 1917, affiant made an affidavit in the above-entitled action, intended to be used upon the order to show cause why a receiver should not be appointed herein. That since the making of said affidavit, the said defendant has continued, at large expense, to finish, repair and reconstruct and



equip its dredges Nos. 2 and 3, and the same are now in actual operation, as is also the power plant of said company referred to in affiant's other affidavit. That the equipping of dredge No. 4 is not yet completed.

H. S. THOMPSON.

Subscribed and sworn to before me this 4th day of September, 1917.

[Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk. [165]

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of Henry L. McCoy, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of Henry L. McCoy—August 4, 1917.**

(Title of Court and Cause.)

State of Pennsylvania,

County of Philadelphia,—ss.

Henry L. McCoy, being duly sworn according to law, deposes and says that he has read the summons issued in the above-entitled case, wherein it is recited that promissory notes aggregating \$25,000 were issued to the Alaska Banking and Safe Deposit Company under a first mortgage executed by the Nome Consolidated Dredging Company; and that affiant has read the averment in the said Bill that the said

\$25,000 was repaid to the Alaska Banking and Safe Deposit Company, in full satisfaction of said notes, prior to the foreclosure proceedings in said summons recited. Your affiant avers that all of said notes, aggregating \$25,000, were not owned by the said Alaska Banking and Safe Deposit Company, but that, on the contrary, your affiant, who was neither a stockholder nor officer of any of the companies named in the aforesaid proceedings, purchased certain of said first mortgage notes aggregating \$4,110.34; that your affiant purchased the said notes with his own personal funds and not at the instance and on behalf of the Alaska Banking and Safe Deposit Company, and that said notes were not liquidated in full and the amount advanced by your affiant repaid to him in full either prior to the foreclosure proceedings recited in the Bill or at any time since.

HENRY L. McCOY.

Sworn to and subscribed before me this fourth day of August, A. D. 1917. [166]

[Seal]

NELLIE S. AITKEN,

Notary Public.

My commission expires Feb. 19, 1921.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. G. A. Adams, Clerk. Sep. 4, 1917.

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of M. W. Newton, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of Mahlon W. Newton—August 3, 1917.**

(Title of Court and Cause.)

State of Pennsylvania,

County of Philadelphia,—ss.

Mahlon W. Newton, being duly sworn according to law, deposes and says that it is true as in the Bill of Complaint in the above cause recited, that there were delivered to the affiant seven (7) of the said promissory notes secured by the \$25,000 first mortgage, said notes aggregating \$3,500. That said notes were delivered to and held by this affiant until at or about the time that the foreclosure suit in said Bill of Complaint arose, when the same were duly endorsed in blank and delivered into the custody of E. E. Powell, then acting in his individual capacity on behalf of all the holders of the securities issued under the terms of the aforesaid mortgage. That said notes, at the time of the foreclosure proceedings, were due and owing and were not then nor ever have been paid in cash. That all of said notes aggregating \$3,500 were acquired by this affiant by paying to the Nome Consolidated Dredging Company the full sum of \$3,500 in cash.

That it is true that under the second or \$200,000 mortgage, there were issued to this affiant at least fourteen (14) [167] of said mortgage notes aggregating, with interest, \$57,603.32, as will more fully appear by the records of your Honorable Court in the aforesaid foreclosure proceedings. That the said notes were acquired by this affiant by paying either to or on behalf and at the direction of the

Nome Consolidated Dredging Company the full principal sum of said notes in cash. That all of said advances, loans or payments aggregating the sums aforesaid made by your affiant were of your affiant's own personal funds and were loaned to or advanced the said debtor corporation at its special instance and request. That all of the aforesaid second mortgage notes were delivered to your affiant and remained in his possession until endorsed in blank and delivered into the custody of the said E. E. Powell, then acting in his individual capacity on behalf of all the holders of the securities issued under the terms of the aforesaid mortgage; and further, your affiant avers that in the purchase of the said mortgage notes and loans and advances your affiant paid to and on behalf of the Nome Consolidated Dredging Company a sum of money aggregating upwards of \$85,000, and that this sum has never been repaid to your affiant in whole or in part.

Your affiant avers that he at no time entered into any conspiracy or combination with parties to the complainant unknown or with the parties named in the complainant's Bill, or with any other parties, to injure or defraud the complainant or to prevent it from collecting any sum or sums of money by the Nome Consolidated Dredging Company due the said complainant.

MAHLON W. NEWTON.

Sworn to and subscribed before me this 3d day of August, A. D. 1917.

[Seal]

MARY A. McSORLEY,

Notary Public.

My commission expires March 25th, 1921. [168]



Filed in the office of the Clerk of the District Court of Alaska, Second Division at Nome. Sep. 4, 1917. G. A. Adams, Clerk.

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of R. G. Cunningham, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of R. G. Cunningham—August 3, 1917.**

(Title of Court and Cause.)

State of Pennsylvania,

County of Philadelphia,—ss.

R. G. Cunningham, being duly sworn according to law, deposes and says that he has read the summons issued in the above-entitled case, wherein it is recited that promissory notes aggregating \$25,000 were issued to the Alaska Banking and Safe Deposit Company under a first mortgage executed by the Nome Consolidated Dredging Company and that affiant has read the averment in the said Bill that the said \$25,000 was repaid to the Alaska Banking and Safe Deposit Company, in full satisfaction of said notes, prior to the foreclosure proceedings in said summons recited. Your affiant avers that all of said notes, aggregating \$25,000, were not owned by the said Alaska Banking and Safe Deposit Company, but that on the contrary, your affiant, who was neither a stockholder nor officer of any of the companies named in the aforesaid proceedings, purchased certain of said first mortgage notes aggregating \$11,100. That your affiant purchased the said

notes with his own personal funds and not at the instance and on behalf of the Alaska Banking and Safe Deposit Company, and that said notes were not liquidated in full and the amount advanced by your affiant repaid to him in full either prior to the foreclosure proceedings recited in the Bill or any *any* time since. [169]

R. G. CUNNINGHAM.

Sworn to and subscribed before me this 3d day of August, A. D. 1917.

[Seal]

MARY A. McSORLEY,  
Notary Public.

My commission expires March 25th, 1921.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk.

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of E. L. Webster, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of E. L. Webster—August 20, 1917.**

(Title of Court and Cause.)

State of Washington,  
County of King,—ss.

E. L. Webster, being first duly sworn according to law, deposes and says that he has read the summons issued in the above-entitled cause, wherein it is recited that promissory notes aggregating \$25,000 were issued to the Alaska Banking and Safe Deposit Company under a first mortgage executed by the Nome

Consolidated Dredging Company, and that affiant has read the averment in the said bill that the said \$25,000 was repaid to the Alaska Banking and Safe Deposit Company in full satisfaction of said notes, prior to the foreclosure proceedings in said summons recited. Your affiant avers that all of said notes aggregating \$25,000 were not owned by the said Alaska Banking and Safe Deposit Company, but that on the contrary your affiant purchased certain four (4) of the said first [170] mortgage notes, aggregating two thousand (\$2,000.00) dollars; that your affiant purchased said notes with his own personal funds, and not at the instance or on behalf of the Alaska Banking and Safe Deposit Company, and that said notes were not liquidated in full and the amount advanced by your affiant repaid to him in full, either prior to the foreclosure proceedings recited in the bill, or at any time since.

E. L. WEBSTER.

Sworn to and subscribed before me this 20th day  
of August, A. D. 1917.

[Seal] W. W. DEARBORN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in the office of the Clerk of the District Court  
of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk.

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of J. V. Sheldon, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of J. V. Sheldon—July 14, 1917.**

(Title *and* Court and Cause.)

United States of America,  
Territory of Alaska,—ss.

J. V. Sheldon, being first duly sworn, deposes and says:

That he is and has been ever since prior to the year 1914, the Cashier of the Alaska Banking & Safe Deposit Company, at Nome, Alaska. That during the years 1914 and 1915, F. H. Thatcher, was President and Manager of said Alaska [171] Banking & Safe Deposit Company.

That on the 15th day of September, 1914, at the opening of business on that day the Nome Consolidated Dredging Co., a corporation, was indebted to the Alaska Banking & Safe Deposit Company, on two promissory notes in the sum of \$5,889.66, and was not otherwise indebted to said Alaska Banking & Safe Deposit Co.

That on said 15th day of September, 1914, said notes were paid, and on the same day the Alaska Banking & Safe Deposit Co., loaned and advanced said Nome Consolidated Dredging Company the sum of \$10,182.79, to evidence which said Nome Consolidated Dredging Company, delivered to said Alaska Banking & Safe Deposit Co., seven (7) promissory notes, the numbers and amounts thereof being as follows:



No. 1	for	500.00
2	for	793.13
3	for	3500.00
4	for	1000.00
5	for	1000.00
6	for	444.83
18	for	2944.83

That all of said notes were dated the 14th day of September, 1914, and were part of an issue of notes aggregating \$25,000.00 and secured by a mortgage and trust deed, dated September 1, 1914, made by the Nome Consolidated Dredging Company, to F. H. Thatcher, Trustee; that although said notes and said mortgage and trust deed were dated September 14, 1914, said notes were not delivered to said bank, or money advanced thereon, until the following day.

Affiant further says that on the 19th day of September [172] 1914, said Alaska Banking & Safe Deposit Co., purchased from one, W. H. Webb, a merchant of the City of Nome, Alaska, two notes secured by said mortgage, numbered respectively, 9 and 33, for \$500.00 each.

That on the 21st day of September, 1914, said note above-mentioned as "No. 2 for \$793.13" was purchased from the Alaska Banking & Safe Deposit Co., by E. E. Powell, and endorsed in blank, without recourse, by said Alaska Banking & Safe Deposit Co., and delivered to said E. E. Powell.

Affiant further says that said Alaska Banking & Safe Deposit Company, continued to own and hold said notes above mentioned, viz., Nos. 1, 3, 4, 5, 6,

9, 18 and 35, all of which bore interest at the rate of twelve per cent per annum, except note No. 33, which bore interest at the rate of six per cent per annum, until the 26th day of April, 1915; and that on the 26th day of April, 1915, said Alaska Banking & Safe Deposit Co., sold, assigned and delivered all of said notes to one, Robert G. Cunningham, for the sum of \$11,106.19, being the full amount of said notes, with interest accrued to date, which sum was paid to the Alaska Banking & Safe Deposit Co., on said 26th day of April, 1915, in the City of San Francisco, State of California, and thereupon said Alaska Banking & Safe Deposit Co., assigned and delivered said notes to said Robert G. Cunningham.

J. V. SHELDON.

Subscribed and sworn to before me this 14th day of July, 1917.

[Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk. [173]

Thereupon the defendant, Alaska Mines Corporation, then offered in evidence the affidavit of G. J. Lomen, which said affidavit was read and received in evidence, being in words and figures as follows, to wit:

**Affidavit of G. J. Lomen—July 14, 1917.**

(Title of Court and Cause.)

United States of America,  
Territory of Alaska,—ss.

G. J. Lomen, being first duly sworn, deposes and says:

That he is and has been for more than ten years last past an attorney at law, practicing his profession at Nome, Alaska.

That in the month of September, 1914, affiant was attorney for and represented the Associated Oil Co., who had a claim against the Nome Consolidated Dredging Co., for more than \$6,000.00, for fuel oil theretofore sold and delivered to said Nome Consolidated Dredging Co.

That on the 25th day of September, 1914, in part payment of said indebtedness, the Nome Consolidated Dredging Co. delivered to affiant, as attorney for the Associated Oil Co., eight (8) certain promissory notes, dated September 14, 1914, and secured by a mortgage and trust deed, dated September 14, 1914, made by said Nome Consolidated Dredging Co., to F. H. Thatcher, Trustee; the numbers and amounts of said notes being as follows:

No. 17	for	\$262.04	
37	for	555.17	
26	for	500.00	
27	for	500.00	
28	for	500.00	
34	for	500.00	
2	for	793.13	
35	for	500.00	[174]

and were a part of a series of notes amounting in the aggregate to \$25,000.00, secured by said trust deed and mortgage.

That according to affiant's recollection all of said notes were signed by said Nome Consolidated Dredging Company, and all of them were made payable to said Nome Consolidated Dredging Company, and by said company endorsed and delivered to affiant as attorney for said Associated Oil Company, except the note No. 2, was originally made payable to the Alaska Banking & Safe Deposit Company, and by it endorsed without recourse.

That affiant forwarded said notes to the Associated Oil Company, at San Francisco, California, shortly after receiving them.

G. J. LOMEN.

Subscribed and sworn to before me this 14 day of July, 1917.

[Seal]

O. D. COCHRAN,

Notary Public, Territory of Alaska.

My commission expires Aug. 4, 1919.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 4, 1917.  
G. A. Adams, Clerk.

Whereupon the defendant Alaska Mines Corporation rested.

Whereupon, the plaintiff in rebuttal offered the reply of the plaintiff to the separate answer of the Alaska Mines Corporation, which said reply had been theretofore filed in the above-entitled action, and the same was read and received in evidence, being in words and figures as follows, to wit:



**Reply to Separate Answer of the Defendant Alaska  
Mines Corporation.**

(Title of Court and Cause.)

Comes now the plaintiff in the above-entitled action [175] and for a reply to the separate answer of the defendant Alaska Mines Corporation, admits, denies and alleges as follows:

Replying to said defendant's further answer and affirmative defense plaintiff alleges:

I.

Replying to paragraph one thereof it admits that said defendant is a corporation organized, created and existing under and by virtue of the laws of the State of Virginia and that its capital stock is \$10,000,000, divided into ten million shares of the par value of one dollar per share, but denies each and every other allegation, matter and thing therein contained and the whole thereof.

II.

Replying to paragraph two thereof plaintiff admits that the Court made and entered the order therein described and that the marshal made, executed and delivered the bill of sale therein described and that said bill of sale was recorded as therein alleged but denies each and every other allegation, matter and thing therein contained and the whole thereof.

III.

Replying to paragraph three thereof, plaintiff admits that the United States marshal made, executed and delivered the deed therein alleged, and that the

same was recorded and that Exhibit "B" annexed to said answer is a correct copy of the same but denies each and every other allegation, matter and thing therein contained, and the whole thereof.

#### IV.

Replying to paragraph four thereof, plaintiff admits that the defendant E. E. Powell made, executed and delivered to the Nome Holding Company the deed described in said paragraph, and that the same was recorded as therein alleged, and that Exhibit "C" [176] annexed to said answer is a correct copy of said instrument, but denies each and every other allegation, matter and thing therein contained, and the whole thereof.

#### V.

Replying to paragraph five thereof, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, except that it admits said defendant delivered to said Nome Holding Co., certificates for 3,701,820 shares of capital stock of said defendant.

#### VI.

Replying to paragraph six thereof, plaintiff admits that the deeds or instruments therein mentioned were made and delivered and recorded as therein alleged, and that the copies set forth as Exhibits "D" and "E" to said answer are true copies of said instruments, but denies each and every other allegation, matter and thing therein contained, and the whole thereof.

#### VII.

Replying to paragraph seven thereof, plaintiff de-

nies each and every allegation, matter and thing therein contained, and the whole thereof. And further replying to said paragraph plaintiff alleges that the said defendant, Alaska Mines Corporation, took the said instruments from the said Nome Holding Company, and took title to all of said property, real and personal, from said Nome Holding Company, with full and complete actual notice, as well as constructive or record notice, of all of the fraudulent acts and things alleged in plaintiff's complaint.

### VIII.

Replying to paragraph eight thereof, plaintiff alleges that it has no knowledge or information of the facts therein alleged and therefore upon information and belief denies each and every allegation, matter and thing thereof, and the whole thereof, [177] except that it admits that the defendant, Alaska Mines Corporation, is now engaged in mining operations at Nome, Alaska, but it particularly denies that the said defendant is solvent or that it has assets in excess of the plaintiff's claims, other than the assets, real and personal, of the Nome Consolidated Dredging Company, acquired by transfers under the foreclosure proceedings mentioned in plaintiff's complaint. And further replying to said paragraph eight plaintiff alleges that the said Alaska Mines Corporation has a total indebtedness of over four hundred thousand dollars (\$400,000.00), nearly all of which is covered by mortgage liens against its assets far in excess of its actual market value.

WHEREFORE plaintiff having fully replied to the separate answer of the defendant Alaska Mines

Corporation, prays for the relief demanded in its complaint.

T. M. REED and  
WILLIAM A. GILMORE,  
Attorneys for Plaintiff.

United States of America,  
Territory of Alaska,  
Second Division,—ss.

William A. Gilmore, being duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled suit; that he has prepared the foregoing reply, knows the contents thereof and the same is true as he verily believes. That he makes this verification for and on behalf of the plaintiff corporation for the reason that said plaintiff is a foreign corporation and has no officer or agent within the Territory of Alaska.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 5th day of September, 1917. [178]

[Seal]

D. B. CHACE,  
Notary Public for the Territory of Alaska, Residing  
at Nome, Alaska.

(My commission expires May 12th, 1921.)

Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome, Sep. 6, 1917.  
G. A. Adams, Clerk.

Whereupon the plaintiff then offered in evidence the annual statement of the Alaska Mines Corporation, and the same was admitted and marked "Plain-



tiff's Exhibit 4," and received in evidence and read to the Court, being in words and figures as follows, to wit:

**Plaintiff's Exhibit No. 4—Annual Statement of Alaska Mines Corporation.**

**ANNUAL STATEMENT.**

**ALASKA MINES CORPORATION.**

10¢ I. T. R. S. attached and cancelled.

ALASKA MINES CORPORATION, a corporation duly organized and existing under the laws of the Commonwealth of Virginia, by its President and Secretary and a majority of the Board of Directors, DOES HEREBY CERTIFY as follows:

FIRST. The name of the corporation is ALASKA MINES CORPORATION, and the location of its principal office or place of business without the District of Alaska is Richmond, Virginia, and the location of its principal office within the District of Alaska is at Juneau, and its place of business is at Nome.

SECOND. The amount of its capital stock is Ten Million Dollars (\$10,000,000).

THIRD. The amount of its capital stock actually paid in money is Two Thousand Dollars (\$2,000 ).

FOURTH. The amount of its capital stock paid in in any other way is Three Million, Seven Hundred and One Thousand, Eight [179] Hundred and Twenty Dollars (\$3,701,820 ), same being paid in in property.

FIFTH. The amount of the assets of the corporation is Two Million Dollars (\$2,000.000 ) consisting

of certain mining claims and other real and personal property having an actual cash value of Two Million Dollars (\$2,000,000).

SIXTH. The liabilities of the corporation amount to Four Hundred and Six Thousand Dollars (\$406,000) of which Three Hundred Thousand (\$300,000), is secured by mortgages on the property of the corporation, the balance being deferred payments on account of mining claims for construction work and other miscellaneous liabilities.

We the undersigned, being the President, the Secretary, and a majority of the Board of Directors of said ALASKA MINES CORPORATION, DO HEREBY CERTIFY to the correctness of the foregoing statement.

JAMES GAYLEY,

President.

WALTER S. REED,

Secretary.

JAMES GAYLEY,

THERON I. CRANE,

HENRY B. LIVINGSTON,

E. E. POWELL,

Majority of Board of Directors.

State of New York,

County of New York,—ss.

On this 4th day of August, 1916, personally appeared before me Theron I. Crane, and E. E. Powell, being two of Directors of the Board, of the above-

named corporation, and upon being sworn, they did depose and say that the foregoing is true.

[Seal]              THOS. M. APPLGARTH. [180]  
Notary Public No. 67, New York Co. New York  
Registered No. 7021.

My commission expires Mch. 30, 1917.

State of New York,  
County of New York,—ss.

No. 20998 Series B.

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That

THOS. M. APPLGARTH, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and

County, the 23 day of August, 1916.

[Seal]

WM. F. SCHNEIDER,  
Clerk.

10¢ I. R. S. attached and cancelled.

State of New York,

County of New York,—ss.

On this 8th day of Aug., 1916, personally appeared before me, James Gayley, President, Walter S. Reed, Secretary, James Gayley and Henry B. Livingston, Directors of the above-named corporation, and upon being sworn, they did depose and say that the foregoing is true, and that James Gayley, T. I. Crane, H. B. Livingston and E. E. Powell, are a majority of the directors.

[Seal]

JOHN H. GEWECKE,

Notary Public, Kings County, No. 23. Certificate  
Filed in New York County No. 44. Kings  
County Register's No. 8024. New York County  
Register's No. 8054.

Commission expires Mch. 30, 1918. [181]

State of New York,

County of New York,—ss.

No. 21170 Series B.

I, WILLIAM F. SCHNEIDER, Clerk of the  
County of New York, and also Clerk of the Supreme  
Court for the said County, the same being a Court of  
Record, DO HEREBY CERTIFY, That

JOHN H. GEWECKE, whose name is subscribed  
to the deposition or certificate of the proof or  
acknowledgment of the annexed instrument, and  
thereon written, was, at the time of taking such  
deposition or proof and acknowledgment, a Notary



Public acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County this 23 day of August, 1916.

[Seal]

WM. F. SCHNEIDER,

Clerk.

10¢ I. T. R. S. attached and cancelled.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 1, 1917, G. A. Adams, Clerk.

Whereupon the plaintiff offered in evidence the affidavit of William M. Eddy, which said affidavit was read and received in evidence, being in words and figures, as follows, to wit:

**Affidavit of Wm. M. Eddy—September 4, 1917.**

(Title of Court and Cause.)

United States of America,  
Territory of Alaska,  
Second Division,—ss.

William M. Eddy, being duly sworn, on oath deposes and says: That he is a resident of the town of Nome, Alaska, and has been residing in Nome for the past eighteen years.

That affiant is very familiar with most of the placer claims on Bourbon Creek, Flat Creek and what is called the Third [182] Beach Line near Nome. That on or about the 22d day of August, 1917, affiant was employed by plaintiff in the above-entitled action and given a list of the property mentioned and described in Exhibit "A" of the plaintiff's complaint in the above-entitled action, with instructions to investigate the condition of the same. That in the list of property given to affiant to inspect was a dredge described as follows: "Also one 7 cubic feet, open connected bucket, Bucyrus Type Dredge, built in 1909; now operating on the Chestnut Tundra placer claim on Wonder Creek, also all the cables and other appurtenances." That affiant went to said vicinity and found the said dredge had been dismantled and many parts of the dredge scattered all over the tundra in the vicinity of the place where said dredge was formerly operating. That said dredge had been dismantled during the past summer of 1917 and many of its parts taken and removed, the remainder of said

dredge being scattered and lying unprotected and exposed to the elements.

That affiant thereafter went to the dredge known as the Flat Creek Dredge situate on the Carnation placer claim on Flat Creek, and, while there, was informed by one of the workmen working on said Flat Creek Dredge for the defendant Alaska Mines Corporation, that the defendant Alaska Mines Corporation had dismantled said Wonder Dredge and had removed and taken some of its parts for use in the construction of said Flat Creek Dredge.

That affiant thereafter inspected the dredge known as the Bourbon Creek Dredge situate on one of the claims on lower Bourbon Creek near the power plant, and also inspected the said power plant; that on several occasions since the 22d day of August, 1917, affiant has been out and observed that the defendant Alaska Mines Corporation was operating said power plant and was using and operating the said Bourbon Creek dredge and actively engaged in mining and digging the placer ground and extracting [183] the gold therefrom. That affiant also observed that the said Flat Creek Dredge has been steadily running, operating and digging on said Carnation Placer claim, one of the claims mentioned in said exhibit above referred to. That the said defendant Alaska Mines Corporation is actively engaged in digging and extracting the gold from the said claims by the use of said dredges and said dredges are of large capacity, readily operated, and in a few weeks will dredge the valuable pay ground contained in said claims now being operated upon. That after the said

dredges pass through said claims, said claims will be rendered absolutely worthless and of no value. That the defendant Alaska Mines Corporation is now finishing and equipping what is known as the Greenberg or Bessie Dredge on Holyoke Creek, said dredge being of exceedingly large capacity and said defendant is intending to operate the said dredge by use of power from the said power plant on Bourbon Creek mentioned and described in the said list of property. That heretofore the said power plant has always been used in operating only the two dredges known as the Bourbon dredge and the Wonder Dredge; that said Wonder Dredge was much smaller in capacity than said Flat Creek dredge and if the said power plant has to furnish power for the said Bourbon Creek dredge and the said Flat Creek dredge and also for the said Greenberg or Bessie dredge on Holyoke Creek, the said power plant will be driven to its maximum capacity and will result in great damage and deterioration to said power plant.

That affiant has no interest in the result of this lawsuit.

W. M. EDDY.

Subscribed and sworn to before me this 4th day of September, 1917.

[Seal]

D. B. CHACE,

Notary Public for the Territory of Alaska, Residing at Nome.

My commission expires May 12th, 1921. [184]

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sep. 6, 1917.  
G. A. Adams, Clerk.



Whereupon the plaintiff offered in evidence the affidavit of William A. Gilmore, which said affidavit was read and received in evidence, being in the words and figures, as follows, to wit:

**Affidavit of Wm. A. Gilmore—September 6, 1917.**

(Title of Court and Cause.)

United States of America,  
District of Alaska,—ss.

William A. Gilmore, being first duly sworn on oath, deposes and says:

That affiant was present at the taking of the deposition of defendant E. E. Powell yesterday at the office of the affiant in Nome and heard said Powell state under oath in the above-entitled cause that he resigned as manager of the defendant Nome Consolidated Dredging Company in the spring of 1915 and that he did not represent said company during the time the foreclosure proceedings were being conducted. That affiant was employed with Judge G. J. Lomen during the month of July, 1915, by several creditors of said defendant Nome Consolidated Dredging Company in an effort to have the said company adjudged an involuntary bankrupt in order to bring proceedings in the name of the trustee to set aside the fraudulent foreclosure proceedings mentioned in the complaint in this action; that among the creditors we represented were Thorulf Lehman, merchant of Nome, W. J. Rowe, transfer man, E. W. Carleton & Co., hardware company, and Scheid & Company, besides some others; that said E. E. Powell, acting as general manager of said defendant, made some ar-

rangements for temporary settlements with some of said creditors, and paid said [185] Scheid & Co. bill in full to said G. J. Lomen, its attorney, in my presence, taking a receipt in full from said attorney to the said Nome Consolidated Dredging Company, said payment being made by said Powell on the day before the sale by the United States marshal of all the assets of said company mentioned in plaintiff's complaint herein. That at the time of said foreclosure proceedings said E. E. Powell was in full control of all the financial affairs of said Nome Consolidated Dredging Company; that affiant since said month of July, 1915, was informed that many of the said creditors were never paid but still remain creditors of said company.

WILLIAM A. GILMORE.

Subscribed and sworn to this 6th day of September, 1917.

[Seal]

J. F. HOBBS,

Notary Public for Alaska, Residing at Nome.

My commission expires May 16, 1920.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sept. 6, 1917. G. A. Adams, Clerk.

Whereupon the plaintiff rested.

Whereupon the said matter was argued to the Court by the attorneys for the plaintiff and the attorneys for the defendant Alaska Mines Corporation, and was submitted to the Court and taken under advisement by the Court for a decision.

BE IT FURTHER REMEMBERED that thereafter on the 22d day of September, 1917, the Court

entered and filed its written opinion on said motion for a receiver, which said opinion was in words and figures as follows, to wit:

**Opinion on Application for Appointment of Receiver.**

(Title of Court and Cause.)    [186]

Without expressing any opinion on the questions of fraud, conspiracy and notice thereof to defendant alleged and involved in this case, but taking into consideration solely the relative assets and liabilities of the defendant corporation, the Court is of opinion that the application for a receiver should be denied, and an order will be so entered.

The evidence of Mr. Miles and others for the plaintiff shows plainly that the assets of the defendant corporation are considerably in excess of its liabilities, and this is not materially affected by the plaintiff's evidence; that the defendant corporation is a going concern; that considerable improvements have been recently made to its already valuable properties, and that further improvements are contemplated. The evidence also shows affirmatively that the property of defendant, Alaska Mines Corporation, is not in danger of loss from neglect, waste, or insolvency of said defendant corporation.

Nome, Alaska, Sept. 22, 1917.

J. R. TUCKER,  
District Judge.

Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome.    Sep. 22, 1917.  
G. A. Adams, Clerk.

The plaintiff at the time of the making, entering and filing of said opinion last hereinbefore set out duly excepted thereto and plaintiff's exception was duly allowed by the Court.

Whereupon the plaintiff gave notice in open court of appeal and the Court thereupon granted the plaintiff thirty days' time in which to prepare, serve and file its Bill of Exceptions. [187]

**Order Settling and Allowing Bill of Exceptions.**

BE IT FURTHER REMEMBERED, that the foregoing Bill of Exceptions contains all the evidence introduced at the hearings therein set forth and said bill having been served, filed and presented for settlement by the plaintiff within the time allowed by law and the orders of the Court duly entered, and now being found full, true and correct, is hereby settled and allowed.

Dated at Nome, Alaska, October 13th, 1917.

J. R. TUCKER,

Judge of the District Court, District of Alaska, Second Div.

The foregoing is Plaintiff's Proposed Bill of Exceptions in the above-entitled action.

October 9th, 1917.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff. [188]

Service by receipt of a copy of the within Bill of Exceptions admitted at Nome, Alaska, this 9th day of October, 1917.

O. D. COCHRAN,

Of Attorneys for Defendant Alaska Mines Corporation.



Service by receipt of a copy of the within corrected, amended, Bill of Exceptions as signed and filed, admitted at Nome, Alaska, this 13th day of October, 1917.

O. D. COCHRAN,  
Of Attorneys for Defendant Alaska Mines Corporation.

[Endorsed]: No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Co., a Corporation, Plaintiff, vs. Alaska Mines Corporation, a Corporation, et al., Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1917. G. A. Adams, Clerk. By —————, Deputy. L. Refiled in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy.  
[189]

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*United States District Court, District of Alaska,  
Second Division.*

AMERICAN MANGANESE STEEL COMPANY,  
etc.,

Plaintiff,

vs.

ALASKA MINES CORPORATION, etc., et al.,  
Defendants.

**Opinion on Application for Appointment of  
Receiver.**

Without expressing any opinion on the questions

of fraud, conspiracy and notice thereof to defendant alleged and involved in this case, but taking into consideration solely the relative assets and liabilities of the defendant corporation, the Court is of opinion that the application for a receiver should be denied, and an order will be so entered.

The evidence of Mr. Miles and others for the plaintiff shows plainly that the assets of the defendant corporation are considerably in excess of its liabilities, and this is not materially affected by the plaintiff's evidence; that the defendant corporation is a going concern; that considerable improvements have been recently made to its already valuable properties, and that further improvements are contemplated. The evidence also shows affirmatively that the property of defendant, Alaska Mines Corporation, is not in danger of loss from neglect, waste, or insolvency of said defendant corporation.

Nome, Alaska, Sept. 22, 1917.

J. R. TUCKER,  
District Judge.

[Endorsed]: #2734. United States District Court, District of Alaska, Second Division. [190] American Manganese Steel Company, etc., Plaintiff, vs. Alaska Mines Corporation, etc., et al., Defendants. Opinion on Application for Appointment of Receiver. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 22, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. [191]

*In the District Court for the District of Alaska,  
Second Division.*

Term Minutes, General, 1917, Term Beginning  
January 13, 1917.

Court convening pursuant to adjournment, Honorable J. R. TUCKER, District Judge, presiding.

Upon the convening of court the following proceedings were had:

\*       \*       \*       \*       \*       \*       \*       \*

**Minutes of Court—September 27, 1917—Re Filing of  
Opinion Denying Application for Appointment  
of Receiver, etc.**

Saturday, September 22d, 1917, 11 A. M.

2734.

AMERICAN MANGANESE STEEL CO.

vs.

ALASKA MINES CORPORATION, et al.

Opinion read denying application for appointment of receiver, exception being taken and allowed to plaintiff's counsel. Opinion filed.

\*       \*       \*       \*       \*       \*       \*       \*

2734.

AMERICAN MANGANESE STEEL CO.

vs.

ALASKA MINES CORPORATION et al.

Counsel Gilmore, for plaintiff, gave oral notice of intention to appeal from the order denying application for a receiver and on motion was granted thirty days in which to prepare and file bill of exceptions.

\*       \*       \*       \*       \*       \*       \*       \*

Whereupon court adjourned until 10 A. M., Monday, September 24th, 1917. [192]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY,  
a Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
NOME CONSOLIDATED DREDGING COMPANY, a Corporation,  
ALASKA DREDGING COMPANY, a Corporation, E. E. POWELL,  
GEORGE D. SCHOFIELD, J. M. SLOAN, E. L. WEBSTER, M. W. NEWTON,  
LOUIS EISENLOHR, F. H. THATCHER, Trustee, C. E. DARLING,  
Trustee, and E. E. POWELL, Trustee,  
Defendants.

**Petition for and Order Allowing Appeal and Fixing  
Amount of Bond.**

Comes now the American Manganese Steel Company, a corporation, plaintiff herein, and believing itself aggrieved by a certain order and opinion made and entered herein on the 22d day of September, 1917, refusing and denying the plaintiff's motion for a receiver *pendente lite*, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that said ap-



peal be allowed and that an order be made fixing the amount of bonds for costs on appeal to be given by appellant.

T. M. REED and  
WILLIAM A. GILMORE,  
Attorneys for American Manganese Steel Company,  
a Corporation, Plaintiff.

On this 13th day of October, 1917, IT IS HEREBY ORDERED that said appeal as above prayed for be allowed, and the amount of the bond for costs to be given by appellant is hereby fixed at Two Hundred Fifty and 00/100 (\$250.00) Dollars.

J. R. TUCKER,  
Judge District Court, District of Alaska, Second  
Division. [193]

Due and timely service of the above and foregoing Petition for Appeal and Order Allowing Said Appeal and Fixing the Cost Bond acknowledged by receipt of a copy thereof this 13th day of October, 1917.

O. D. COCHRAN,  
Of Attorneys for Defendant Alaska Mines Corporation, a Corporation.

No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Company, a Corporation, Plaintiff, vs. Alaska Mines Corporation, a Corporation, et al., Defendants. Petition for Appeal and Order Allowing Said Appeal and Fixing the Amount of Cost Bond. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. Wm. A. Gilmore, of Attorneys for Plaintiff. [194]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY,  
a Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corpora-  
tion, NOME CONSOLIDATED DREDG-  
ING COMPANY, a Corporation, ALASKA  
DREDGING COMPANY, a Corporation, E.  
E. POWELL, GEORGE D. SCHOFIELD,  
J. M. SLOAN, E. L. WEBSTER, M. W.  
NEWTON, LOUIS EISENLOHR, F. H.  
THATCHER, Trustee, C. E. DARLING,  
Trustee, and E. E. POWELL, Trustee,  
Defendants.

**Undertaking for Costs on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, American Manganese Steel Corporation, a  
corporation, as principal and H. Greenberg and J. J.  
Cole, as sureties, are held and firmly bound unto  
Alaska Mines Corporation, a corporation, defendant  
in the above-entitled action, in the sum of Two Hun-  
dred Fifty and 00/100 (\$250.00) Dollars, lawful  
money of the United States of America, for the pay-  
ment of which, well and truly to be made, we bind  
ourselves, and our and each of our heirs, executors  
and administrators, jointly and severally, firmly by  
these presents.

SEALED WITH OUR SEALS and dated at Nome, Alaska, this 13th day of October, 1917.

The condition of this bond is such that,

WHEREAS, an order has been made and entered in the above-entitled action allowing the appeal of the plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit, from a certain order and opinion made and entered herein in the above-entitled cause on the 22d day of September, 1917, denying and refusing [195] the plaintiff's motion for the appointment of a receiver, *pendente lite*, and a citation is about to issue citing and admonishing the said defendant, Alaska Mines Corporation, a corporation, to be and appear at a term of said Circuit Court of Appeals to be held in the city of San Francisco, State of California, and show cause why said order should not be reversed:

NOW, THEREFORE, if the appellant, American Manganese Steel Company, a corporation, will prosecute said appeal to effect and answer all costs, if it fails to sustain its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

AMERICAN MANGANESE STEEL COM-  
PANY, [Seal]

By WILLIAM A. GILMORE,  
Its Attorney.

H. GREENBERG. (Seal)

J. J. COLE. (Seal)

United States of America,  
District of Alaska,—ss.

H. GREENBERG and J. J. COLE, being first duly sworn, each for himself and not one for the other deposes and says:

That he is a resident of Nome, Alaska, and a surety on the within and foregoing undertaking; that he is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court, and that he is worth the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

H. GREENBERG.

J. J. COLE.

Subscribed and sworn to before me this 13th day of October, 1917.

[Seal]

WILLIAM A. GILMORE.

Notary Public in and for the District of Alaska.

My commission expires July 27, 1919.

The above and foregoing bond is hereby approved.

Done in open court this 13th day of October, 1917.

J. R. TUCKER,

Judge, District Court, District of Alaska, Second  
Division. [197]

Due and timely service of above and foregoing Undertaking for costs on Appeal acknowledged by receipt of a copy this 13th day of October, 1917.

O. D. COCHRAN,

Of Attorneys for Defendant Alaska Mines Corporation, a Corporation.



No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Company, a Corporation, Plaintiff vs. Alaska Mines Corporation, a Corporation, et al., Defendants. Undertaking for Costs on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. Wm. A. Gilmore, of Attorneys for Plaintiff. [198]

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*In the District Court for the District of Alaska, Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY,  
a Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
NOME CONSOLIDATED DREDGING COMPANY, a Corporation, ALASKA DREDGING COMPANY, a Corporation,  
E. E. POWELL, GEORGE D. SCHOFIELD,  
J. M. SLOAN, E. L. WEBSTER, M. W. NEWTON, LOUIS EISENLOHR, F. H. THATCHER, Trustee, C. E. DARLING, Trustee, and E. E. POWELL, Trustee,  
Defendants.

**Assignment of Errors on Appeal from Interlocutory  
Order Refusing and Denying Plaintiff's Motion  
for a Receiver Pendente Lite.**

Comes now the plaintiff, American Manganese Steel Company, a corporation, in the above-entitled action and assigns the following errors as having been committed by the Court in making and entering its order and opinion refusing and denying the plaintiff's motion for a receiver *pendente lite* in the above-entitled action on the 22d day of September, 1917, upon which errors said plaintiff will and does rely upon its appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit.

1.

The Court erred in making and entering said order and opinion refusing and denying the plaintiff's motion for a receiver *pendente lite* in the above-entitled action for the following reasons:

First: Because it appears from the record that the plaintiff was entitled to the appointment of a receiver to take possession of the assets, real and personal, involved in the litigation.

Second: Because it appears from the record that the plaintiff was entitled to the receiver to preserve the said assets *pendente lite* from waste and depreciation.

Third: Because it appears from the record that the defendant, [199] Alaska Mines Corporation, a corporation, took the said assets in dispute, both real and personal, with full notice and knowledge

of the rights of the plaintiff as a creditor of the Nome Consolidated Dredging Company.

Fourth: Because it appears from the record undisputed that the said assets were confiscated and taken from the said Nome Consolidated Dredging Company by fraud, and that the defendant, Alaska Mines Corporation, a corporation, had knowledge of said fraudulent acts.

Fifth: Because it appears from the record that the Alaska Mines Corporation, a corporation, has no other assets save and except the assets involved in this action, and that a receiver *pendente lite* is necessary to prevent said assets from becoming further encumbered from mortgages or liens, or squandered or dissipated pending the hearing of this suit on its merits.

Sixth: Because it appears affirmatively in the record that the Alaska Mines Corporation was not a *bona fide* purchaser of said assets.

Seventh: Because it further appears from the record that if the plaintiff prevails on the merits at the trial of the action a receiver should be necessary to take possession and sell the said assets to pay the judgment of the plaintiff.

2.

The Court erred in making and entering said order refusing and denying plaintiff's said motion for a receiver *pendente lite* because it appears from the record that it is an abuse of discretion in the trial court in permitting the defendant Alaska Mines Corporation to hold possession, use and enjoy the property in dispute, real and personal, and the proceeds thereof *pendente lite*. [200]

3.

The Court erred in making and entering said order refusing and denying plaintiff's said motion for a receiver *pendente lite* because it was contrary to equity and justice.

WHEREFORE, plaintiff American Manganese Steel Company, a corporation, prays that said order so made and entered on the 22d day of September, 1917, refusing and denying the plaintiff's motion for a receiver *pendente lite* in the above-entitled action, be reversed and that a mandate may issue ordering and directing the above-entitled court to appoint a receiver *pendente lite* to take possession, control, hold and preserve the said assets, real and personal, *pendente lite*.

Dated at Nome, Alaska, this 13th day of October, 1917.

T. M. REED and

WILLIAM A. GILMORE,

Attorneys for Plaintiff, American Manganese Steel Company, a Corporation.

Due and timely service of the above and foregoing Assignment of Errors acknowledged by a receipt of a copy thereof at Nome, Alaska, this 13th day of October, 1917.

O. D. COCHRAN,

Of Attorneys for Defendant Alaska Mines Corporation, a Corporation.

[Endorsed]: No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Company, a Corporation, Plaintiff, vs. Alaska Mines Corporation, a Corporation,



252      *American Manganese Steel Company*

et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. Wm. A. Gilmore, of Attorneys for Plaintiff. [201]

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*In the District Court for the District of Alaska, Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY,  
a Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
NOME CONSOLIDATED DREDGING COMPANY, a Corporation, ALASKA DREDGING COMPANY, a Corporation,  
E. E. POWELL, GEORGE D. SCHOFIELD,  
J. M. SLOAN, E. L. WEBSTER, M. W. NEWTON, LOUIS EISENLOHR, F. H. THATCHER, Trustee, C. E. DARLING, Trustee, and E. E. POWELL, Trustee,  
Defendants.

**Order Enlarging Time Sixty Days After Return Day of Citation to File Record and Docket Cause in Appellate Court.**

On motion of counsel for American Manganese Steel Company, a corporation, appellant in the above-entitled suit,

IT IS HEREBY ORDERED that the time for filing and docketing the transcript and record in the

above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, upon an appeal from an interlocutory order refusing and denying the plaintiff's motion for a receiver *pendente lite*, be, and the same is hereby enlarged sixty days after the return day of the citation issued on said appeal.

Done in open court at Nome, Alaska, this 13th day of October, 1917.

J. R. TUCKER,

Judge, District Court, District of Alaska, Second Division.

Due and timely service of the above and foregoing Order enlarging time to file record and docket case is hereby acknowledged by receipt of a copy thereof at Nome, Alaska, this 13th day of October, 1917.

O. D. COCHRAN,

Of Attorneys for Defendant Alaska Mines Corporation, a Corporation. [202]

[Endorsed]: No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Company, a Corporation, Plaintiff, vs. Alaska Mines Corporation, a Corporation, et al., Defendants. Original Order Enlarging Time to File Record and Docket Case. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. Wm. A. Gilmore, of Attorneys for Plaintiff. [203]

*In the District Court for the District of Alaska,  
Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY, a  
Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
N O M E CONSOLIDATED DREDGING  
COMPANY, a Corporation, ALASKA  
DREDGING COMPANY, a Corporation, E.  
E. POWELL, GEORGE D. SCHOFIELD, J.  
M. SLOAN, E. L. WEBSTER, M. W. NEW-  
TON, LOUIS EISENLOHR, F. H. THAT-  
CHER, Trustee, C. E. DARLING, Trustee,  
and E. E. POWELL, Trustee,

Defendants.

**Praeipce for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare and certify transcript of the record in the above-entitled action on the plaintiff's appeal from the Court's order refusing and denying the plaintiff's motion for a receiver *pendente lite*, said record to consist of the Bill of Exceptions heretofore signed and filed, together with the appeal papers, and also a copy of the Court's opinion, as required by rules of the Court of Appeals, denying and refusing plaintiff's motion for a receiver, together with the minute orders of the Court in the above-entitled action for September 22, 1917.

Dated at Nome, Alaska, this 13th day of October, 1917.

T. M. REED and  
WILLIAM A. GILMORE,  
Attorneys for Plaintiff.

[Endorsed]: No. 2734. In the District Court for the District of Alaska, Second Division. American Manganese Steel Company, a Corporation, Plaintiff, vs. Alaska Mines Corporation, a Corporation, et al., Defendants. Praeceptum for Transcript of Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 13, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. Wm. A. Gilmore, of Attorneys for Plaintiff. [204]

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*In the District Court for the District of Alaska,  
Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY, a  
Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
N O M E C O N S O L I D A T E D D R E D G I N G  
C O M P A N Y, a Corporation, ALASKA  
D R E D G I N G C O M P A N Y, a Corporation, E.  
E. POWELL, GEORGE D. SCHOFIELD, J.  
M. SLOAN, E. L. WEBSTER, M. W. NEW-



TON, LOUIS EISENLOHR, F. H. THATCHER, Trustee, C. E. DARLING, Trustee, and E. E. POWELL, Trustee,

Defendants.

**Citation on Appeal from Order Refusing and Denying Plaintiff's Motion for a Receiver Pendente Lite.**

United States of America,—ss.

The President of the United States of America to the Alaska Mines Corporation, a Corporation, Defendant, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, on the 10th day of November, 1917, pursuant to an order allowing an appeal filed in the office of the clerk of the District Court, District of Alaska, Second Division, from a certain interlocutory order refusing and denying the plaintiff's motion herein for a receiver *pendente lite* made, filed, and entered in said court on the 22d day of September, 1917, in that certain suit in equity wherein you, the said Alaska Mines Corporation, a corporation, are a defendant and the American Manganese Steel Company, a corporation, is plaintiff, to show cause, if any there be, why the said interlocutory order rendered against the said American Manganese Steel Company, a corporation, as in said order allowing appeal mentioned should not be [205] reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE,  
Chief Justice of the Supreme Court of the United  
States of America, this 13th day of October, 1917.

J. R. TUCKER,  
Judge, District Court, District of Alaska, Second  
Division.

Attest my hand and seal of the United States  
District Court for the District of Alaska, Second  
Division, at the clerk's office, at Nome, Alaska, this  
13th day of October, 1917.

[Seal] G. A. ADAMS,  
Clerk of the District Court, District of Alaska, Sec-  
ond Division. [206]

Due and timely service of the above and foregoing  
Citation is hereby acknowledged by receipt of a copy  
thereof at Nome, Alaska, this 13th day of October,  
1917.

O. D. COCHRAN,  
Of Attorneys for Defendant Alaska Mines Corpora-  
tion, a Corporation. [207]

[Endorsed]: No. 2734. In the District Court for  
the District of Alaska, Second Division. American  
Manganese Steel Company, a Corporation, Plaintiff,  
vs. Alaska Mines Corporation, a Corporation, et al.,  
Defendants. Citation. Filed in the Office of the  
Clerk of the District Court of Alaska, Second Di-  
vision, at Nome, Oct. 13, 1917. G. A. Adams, Clerk.  
By W. C. McG., Deputy.

*In the District Court for the District of Alaska,  
Second Division.*

No. 2734.

AMERICAN MANGANESE STEEL COMPANY, a  
Corporation,

Plaintiff,

vs.

ALASKA MINES CORPORATION, a Corporation,  
et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

I, G. A. Adams, clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 208, both inclusive, are a true and exact transcript of the Bill of Exceptions, Court's opinion denying and refusing to appoint a receiver, minute orders of the court in the above-entitled action for September 22d, 1917, petition for appeal and order allowing appeal, undertaking for costs on appeal, assignment of errors, order enlarging time to file record and docket case, and praecipe for transcript of record, in the above-entitled action, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original citation in the above-entitled action is attached to this transcript.

Cost of transcript \$105.05, paid by William A. Gilmore, of attorneys for plaintiff.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 16th day of October, A. D. 1917.

[Seal]

G. A. ADAMS,  
Clerk. [208]

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[Endorsed]: No. 3076. United States Circuit Court of Appeals for the Ninth Circuit. American Manganese Steel Company, a Corporation, Appellant, vs. Alaska Mines Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed November 10, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 3076

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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AMERICAN MANGANESE STEEL COMPANY  
(a corporation),

*Appellant,*

VS.

ALASKA MINES CORPORATION  
(a corporation), et al.,

*Appellees.*

**BRIEF FOR APPELLANT**

---

WILLIAM A. GILMORE,  
T. M. REED,

*Attorneys for Appellant.*

FILED

FEB 3 - 1910

R. O. MONTGOMERY  
CLERK



No. 3076

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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AMERICAN MANGANESE STEEL COMPANY  
(a corporation),

*Appellant,*

VS.

ALASKA MINES CORPORATION  
(a corporation), et al.,

*Appellees.*

## BRIEF FOR APPELLANT

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### Statement of the Case.

This is a creditor's suit brought by the plaintiff (appellant herein), a judgment creditor of the defendant, Nome Consolidated Dredging Company (one of the appellees herein), to set aside a decree of the above entitled court of foreclosure of two deeds of trust or mortgages by the said Nome Consolidated Dredging Company and the sales thereunder, and transfers thereafter made, and to declare subject to the equitable lien of the appellant the property and assets of the said Nome Consolidated



Dredging Company now in the possession and control of the defendant, Alaska Mines Corporation (also an appellee herein); said assets being described in detail in the decree, a copy of which is annexed to the complaint (Tr. pp. 27, 28, 29, 30 and 31).

Appellant in its complaint (Tr. p. 2), alleges that the appellee, Nome Consolidated Dredging Company, was at and prior to the 14th day of September, 1914, indebted to appellant in the sum of \$25,000 with interest thereon, for machinery, steel and dredging equipment theretofore delivered to and used by it in its mining operations in the Nome mining district, District of Alaska, which said indebtedness was evidenced by certain promissory notes, executed by said appellee and endorsed to the appellant, and that on the 14th day of September, 1914, an action was pending in the Court of the Common Pleas for the City and County of Philadelphia, State of Pennsylvania, for the recovery of amount due on said promissory notes which were then long past due and unpaid; that such proceedings were had in said action in Pennsylvania, that on the 8th day of June, 1916, a judgment was recovered by the appellant against the said appellee for the sum of \$30,920 with interest and costs; that thereafter the appellant brought a law action in the District Court for the District of Alaska, Second Division, based on said judgment against said appellee and therein recovered judgment against said

appellee in the said sum of \$30,920 with interest and costs and thereafter caused an execution to be issued therein which was subsequently returned nulla bona by the United States Marshal, and that the said judgment now remains unpaid and unsatisfied, and that the said judgment debtor, Nome Consolidated Dredging Company, is wholly insolvent by reason of the acts and things in said complaint thereafter recited.

That on the 14th day of September, 1914, while said appellee was so indebted to the appellant, the said appellee acting by and through E. E. Powell (also an appellee herein), while acting as vice-president and general manager, made, executed and delivered to one F. H. Thatcher, trustee (also an appellee herein), a certain trust deed or mortgage referred to as the Thatcher mortgage, conveying to him all its real and personal property to secure an issue of promissory notes aggregating a sum of \$25,000, which said notes consisted of a series of 37 notes, some of which purported to be delivered to the Alaska Banking & Safe Deposit Company, a corporation of Nome, Alaska, of which corporation said Thatcher was manager and principal officer, and others of said notes to the mortgagor, and to M. W. Newton, Louis H. Eisenlohr, and E. L. Webster, all officers and directors of the mortgagor, Nome Consolidated Dredging Company; and that the said Alaska Banking & Safe Deposit Company was paid in full by said E. E. Powell as general

manager of the appellee, Nome Consolidated Dredging Company, long prior to the commencement of foreclosure proceedings hereinafter mentioned.

That on the 16th day of September, 1914, and only two days after said Thatcher mortgage was executed and delivered, the said appellee, Nome Consolidated Dredging Company, again acting by and through said appellee, E. E. Powell, its vice-president and general manager, with intent to defraud its creditors and particularly the appellant, who was then litigating its claim in the court of Pennsylvania, and with the further intent to prefer certain of its officers and agents and stockholders as preferred creditors as against the appellant, made, executed and delivered to one J. M. Sloan (also an appellee herein), as trustee, its certain trust deed or mortgage herein referred to as the Sloan mortgage, conveying all the real and personal property of every nature whatsoever belonging to said appellee, Nome Consolidated Dredging Company, to the said J. M. Sloan as trustee, as security for the payment of a series of alleged promissory notes aggregating the sum of \$200,000.00, which said alleged promissory notes were issued in a series from 1 to 70, consecutively; that the said notes, secured by the said Sloan mortgage, were by the trustee pretended and alleged to be delivered as follows: four notes to the appellee, Louis H. Eisenlohr, an officer and stockholder of the Nome Consolidated Dredging Company; 14 of said notes aggregating the sum of \$57,-

603.52 were pretended and alleged to be delivered to the appellee, M. W. Newton, the president and stockholder of said mortgagor; the remainder of said promissory notes aggregating the sum of \$129,345.63 were pretended and alleged to be delivered to the Alaska Dredging Company (also an appellee herein), said Alaska Dredging Company being officered and controlled by the said appellee, E. E. Powell; that in truth and in fact, none of said notes were ever delivered, but at all times were spurious and worthless and were held and kept in the possession of said appellee, E. E. Powell, to further the plans, schemes and conspiracy to defraud the appellant.

That prior to the month of September, 1914, the appellee, E. E. Powell, entered into a plan, scheme and conspiracy with the appellees, M. W. Newton, Louis H. Eisenlohr, E. L. Webster, George D. Schofield, the Alaska Dredging Company and others unknown to the appellant, whereby it was understood and agreed between them, that the said Thatcher mortgage and the said Sloan mortgage should be executed and recorded and thereafter foreclosure proceedings instituted and thereby all of the assets, real and personal, of the appellee, Nome Consolidated Dredging Company, sold so as to preclude any creditors and particularly the appellant from recovering, and to shut out all stockholders, save and except the favored few who were to participate in the results of said scheme and conspiracy; that at said time it was further agreed and understood



that said Powell should act as the trustee of all of said persons so scheming and conspiring and that said Powell should thereafter begin foreclosure proceedings in the District Court and at a subsequent sale bid in all the assets of the said appellant, Nome Consolidated Dredging Company, as trustee for such persons and that thereafter they were to organize a new company or corporation to take over the title by bill of sale and deed from said Powell as trustee and operate the dredges, machines and mines of the said appellant, Nome Consolidated Dredging Company, and participate in the ownership of the stock and management of such corporation when so organized.

That at the time of the making of the said Thatcher mortgage and the said Sloan mortgage in September, 1914, the said appellee, Nome Consolidated Dredging Company, was wholly insolvent and was unable to pay its just debts and liabilities; that said Powell, while acting as vice-president and general manager of the appellee, Nome Consolidated Dredging Company, then and there planned, schemed and conspired with said Newton, Eisenlohr, Webster and the Alaska Dredging Company to fraudulently prefer each of them to other creditors of the said Nome Consolidated Dredging Company and particularly as against the appellant; that in pursuance of said plan, scheme and conspiracy, said Powell caused said Thatcher mortgage and said Sloan mortgage to be made, executed, delivered and recorded, thereby intending to cover all real and personal property

belonging to the Nome Consolidated Dredging Company with liens to prevent this appellant, an unsecured creditor, from recovering its just claim from the assets of said debtor company.

That thereafter pursuant to said scheme, the said Powell, on the 24th day of June, 1915, in the name of said Thatcher, as trustee and in his own name as trustee, and individually, and in the name of others as plaintiffs, brought suit in the District Court for the District of Alaska, against the said appellee, Nome Consolidated Dredging Company and C. E. Darling, trustee (also an appellee herein), who had been substituted prior thereto as trustee for said J. M. Sloan in said Sloan mortgage; that immediately after said suit was commenced by said Powell, he thereupon as general manager of said Nome Consolidated Dredging Company, employed an attorney who appeared and filed an answer in said cause, and said Powell also employed an attorney to represent said C. E. Darling, trustee, and caused said attorney to appear and file a cross-complaint and answer in said suit; that thereupon said Powell, acting for all the parties and directing the proceedings for the plaintiffs, the defendants and the cross-complainants in said suit in conformity with his scheme, plan and conspiracy to defraud the creditors of the said Nome Consolidated Dredging Company and particularly this appellant, caused his various counsel and attorneys to stipulate the said cause for trial immediately so that the said foreclosure suit was brought on for trial before the said court within seven days

from the date it was commenced, to-wit: on the first day of July, 1915. Thereupon said Powell had entered without objection, a decree of foreclosure prepared by his personal attorney, a copy of which decree is annexed to the said complaint (Tr. p. 19), which said decree by its terms ordered and directed a sale of all of the property, real and personal, of the said Nome Consolidated Dredging Company to satisfy the amounts alleged to be due on the several series of notes mentioned in both of said mortgages, and as part and parcel of said scheme and conspiracy, said Powell caused his said attorneys to prepare said decree so that said spurious and worthless notes could be used by him in bidding in said assets at the Marshal's sale, thereby preventing any bona fide bidders from bidding at said sale; that immediately thereafter said property was sold on execution in said cause by the United States Marshal for the Second Division, Territory of Alaska, and said Powell in conformity with his said scheme and conspiracy bid in all the personal property of said Nome Consolidated Dredging Company for the sum of \$20,000 and all its realty for the sum of \$3,000 as shown by the Marshal's return, copy of which is annexed to the said complaint (Tr. p. 31); that at said sales appeared several bona fide purchasers able and willing to bid on said property for cash, but it was impossible for them to compete with said Powell who was using said spurious and worthless notes under the terms of said decree in paying for his bids made at said sales; that said Powell purchased all of

said assets of the said Nome Consolidated Dredging Company as trustee for himself and his other officers and conspirators and took title at said sales from the said Marshal as said trustee for the use and benefit of the same, with intent to hinder, delay and defraud the appellant, and other creditors and stockholders who were not in on said scheme, so planned and carried out by said Powell.

That thereafter, the said Powell caused a concern to be organized in conformity with such scheme, called the Nome Holding Company, and attempted to carry out the said scheme; that thereafter, said Newton, Eisenlohr, Webster, the Alaska Dredging Company, said Powell and others, in conformity with said plan and scheme, organized the said appellee, Alaska Mines Corporation, with full knowledge on the part of all concerned of the fraud perpetrated upon the appellant and other creditors of the said Nome Consolidated Dredging Company and its innocent stockholders, transferred all of said assets, both real and personal described in said decree above set forth, to said newly organized concern and to the said Alaska Mines Corporation; and the said Alaska Mines Corporation thereupon took possession of all of said assets and claims to be the owner and holder thereof, and entitled to the possession; that all the stock of the said Nome Holding Company and Alaska Mines Corporation was subscribed and divided between said schemers and conspirators, who proceeded to elect themselves and employees as directors and officers of said concern, to manage and



control the said dredges, machines, and mines, mentioned and described in said decree; that on the 8th day of October, 1915, said Powell, still acting as agent, manager and vice-president of said Nome Consolidated Dredging Company and long after he had bid in said assets, real and personal, and while he was operating the same as such trustee, made a written statement under oath and filed or caused it to be filed with the clerk of the above entitled court, a copy of which (Tr. p. 37), is attached to the said complaint and marked, Exhibit "C," wherein the said Powell swore that on the 30th day of June, 1915, being the day before said foreclosure trial of said Thatcher and Sloan mortgages, that the said assets of the said Nome Consolidated Dredging Company were far in excess of all its debts and liabilities and of the total value of \$670,906.31, but that said Powell conspired and conducted said foreclosure proceedings in such way and manner by the use of said spurious and worthless notes and otherwise so that all of said assets were confiscated by him and subsequently assigned and transferred to the appellee, Alaska Mines Corporation, in fraud of the rights of the appellant, who was then a creditor of said Nome Consolidated Dredging Company.

That said Powell as trustee for the conspirators, immediately after said sales, took possession of all of said assets and operated the dredges and mines during the remainder of the season of 1915 and he and his co-conspirators and schemers refused to longer recognize the Nome Consolidated Dredging

Company as the owner of said assets, and for his own use and the use of his co-conspirators kept and retained the proceeds of the said mining operations for the year 1915; that said conspirators, acting with others, organized the Alaska Mines Corporation during the year 1916 with full knowledge and notice of the rights of the appellant as a creditor of said appellee, Nome Consolidated Dredging Company; that said Alaska Mines Corporation took title by bill of sale and deed, to said assets and entered into the possession of the personal and real property, consisting of mines, dredgés, machinery, mining claims and other equipment, and began to use the same in conducting mining operations with full knowledge and notice of the fraud perpetrated.

That the said mining claims described in the decree are valuable only for the gold therein contained and when the said gold is mined therefrom will be rendered worthless; that said machinery and equipment is being used by the appellee, Alaska Mines Corporation, and by reason thereof, is being worn and depreciated and in time will be rendered valueless; that said Alaska Mines Corporation claims to be the owner of the said assets and threatens to dispose of the same for their own use and benefit, refusing at all times, to recognize any right, title or interest therein of the Nome Consolidated Dredging Company.

That the appellant, a judgment creditor of said Nome Consolidated Dredging Company, has ex-

hausted all its legal remedies against the Nome Consolidated Dredging Company and is unable to collect its judgment or any part thereof, by legal process; that appellant has no other remedy, other than this equitable cause to subject the said assets to the payment of its claims, and in order to preserve and protect the said property, pendente lite, it is necessary for the court to appoint a receiver to take possession of all of the said assets, real and personal, and preserve the same for distribution.

The appellee, Alaska Mines Corporation, subsequently filed its answer (Tr. p. 143), wherein the said appellee denies, generally, the allegations of the appellant's complaint, except that it admits the execution of the said Thatcher and Sloan mortgages and the subsequent foreclosure thereof, together with the sales made thereunder, and claims that it is now in the sole and exclusive possession of the property and claims such ownership and right of possession as a bona fide purchaser for value.

Default for want of appearance and answer was entered against the appellant, Nome Consolidated Dredging Company, and C. E. Darling, trustee (Tr. p. 46).

The appellant in reply to the separate answer of the appellee, Alaska Mines Corporation, denies that appellee, Alaska Mines Corporation, was a bona fide purchaser for value, but alleges that it took the property and possession thereof with full notice and

knowledge of all the fraudulent actions alleged in appellant's complaint.

At the time of the filing of this suit appellant filed its written motion (Tr. p. 43), praying the court for an order appointing a receiver, pendente lite, to take possession and control of all of said assets, real and personal, belonging to the said Nome Consolidated Dredging Company and covered by said Thatcher and Sloan mortgages and the foreclosure proceedings had thereunder, as described in Exhibit "A" to the appellant's complaint, basing said motion for a receiver upon the said complaint and the affidavit of William A. Gilmore (Tr. p. 40), and upon all of the records and files of said Thatcher foreclosure suit and upon the records, files and proceedings in all other actions and suits, mentioned and pertaining to the property described.

Upon the filing of said complaint and affidavit and motion for a receiver, the court entered its order to show cause (Tr. p. 44), directed against the said appellees, ordering and directing them to show cause, if any they have, why a receiver should not be appointed in this suit, to take possession of all of the assets, real and personal, mentioned and described in appellant's complaint.

Subsequently, the said order to show cause against said appellees came on to be heard before the trial court on the 6th day of September, 1917.

The appellant, in support of its motion for a receiver, pendente lite, introduced and read in evi-



dence, the said complaint and affidavit above referred to, and also offered in evidence the original annual statement of the said Nome Consolidated Dredging Company, signed by said Powell, for the year 1915 (Tr. p. 37). Appellant also introduced and read in evidence the deposition of the said E. E. Powell (Tr. p. 47), taken in the case of George D. Schofield v. E. E. Powell, in the District Court, for the District of Alaska, on the 25th day of August, 1915, and taken at a time during the said foreclosure proceedings under the Thatcher and Sloan mortgages. The said appellee, George D. Schofield herein, having sued the said appellee, E. E. Powell, during said summer of 1915 for attorney's fees alleged to have been performed by him, involving the alleged conspiracy herein and other services. Reference to said deposition is hereafter made in our argument.

Appellant also offered a copy of the deposition of said appellee, George D. Schofield (Tr. p. 88), taken on the 31st day of August, 1915, in the said case of George D. Schofield v. E. E. Powell, for the purpose of showing the plan, scheme and conspiracy alleged in appellant's complaint. Reference to said deposition is hereafter made in our argument. Appellant also offered in evidence the deposition of said E. E. Powell (Tr. p. 115), taken in this suit on the 5th day of September, 1917, at Nome, Alaska, being the day before said motion and order to show cause for the appointment of a receiver came on for hearing before the court; said deposition being offered in evidence to prove, corroborate and substantiate the

charges of fraud and notice alleged in appellant's complaint. Reference to said deposition is also made hereafter in our argument.

The appellee, Alaska Mines Corporation, then in resistance to the motion of the appellant for a receiver, offered and read its separate answer (Tr. p. 143), together with the exhibits attached thereto, and also the affidavit of E. E. Powell (Tr. p. 180); also the affidavits of J. H. Miles (Tr. p. 201), H. S. Thompson (Tr. p. 207), Henry L. McCoy (Tr. p. 212), M. W. Newton (Tr. p. 214), R. G. Cunningham (Tr. p. 216), E. L. Webster (Tr. p. 217), J. C. Sheldon (Tr. p. 219) and G. J. Loman (Tr. p. 222).

The appellant in rebuttal at said hearing then offered and read to the court its reply to the separate answer of the appellee, Alaska Mines Corporation (Tr. p. 224); also the annual statement of the Alaska Mines Corporation (Tr. p. 228); also the affidavit of W. M. Eddy (Tr. p. 233), and the affidavit of W. A. Gilmore (Tr. p. 236).

The matter was then submitted to the trial court on argument and briefs and thereafter on the 22nd day of September, 1917, the court entered its opinion and order (Tr. pp. 238 and 242), refusing and denying the application for a receiver, pendente lite, whereupon the appellant appealed from said order refusing and denying the receiver.

### Specification of Errors.

1. The court erred in making and entering said order and opinion refusing and denying the appellant's motion for a receiver, pendente lite, in the above entitled cause for the following reasons:

First: Because it appears from the record that the appellant was entitled to the appointment of a receiver to take possession of the assets, real and personal, involved in the litigation.

Second: Because it appears from the record that the appellant was entitled to the receiver to preserve the said assets, pendente lite, from waste and depreciation.

Third: Because it appears from the record that the appellee, Alaska Mines Corporation, a corporation, took the said assets in dispute, both real and personal, with full notice and knowledge of the rights of the appellant as a creditor of the appellee, Nome Consolidated Dredging Company.

Fourth: Because it appears from the record, undisputed, that the said assets were confiscated and taken from the said Nome Consolidated Dredging Company by fraud and that the appellee, Alaska Mines Corporation, had knowledge of said fraudulent actions.

Fifth: Because it appears from the record that the Alaska Mines Corporation has no other assets, save and except the assets involved in this action, and that a receiver, pendente lite, is necessary to prevent said assets from becoming further encumbered from

mortgages, or liens, or squandered, or dissipated pending the hearing of this suit on its merits.

Sixth: Because it appears affirmatively in the record that the said Alaska Mines Corporation was not a bona fide purchaser of said assets.

Seventh: Because it appears from the record that if the appellant prevails on the merits at the trial of the suit, a receiver should be necessary to take possession and sell the said assets to pay the judgment of appellant (Assignment of Errors, No. 1) (Tr. p. 249).

2. The court erred in making and entering said order refusing and denying appellant's said motion for a receiver, pendente lite, because it appears from the record that it was an abuse of discretion in the trial court in permitting the appellee, Alaska Mines Corporation, to hold possession, use and enjoy the property in dispute, real and personal, and the proceeds thereof, pendente lite (Assignment of Errors, No. 2).

3. The court erred in making and entering said order refusing and denying appellant's said motion for a receiver, pendente lite, because it was contrary to equity and justice (Assignment of Errors, No. 3).

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### Argument.

This creditor's suit to set aside the foreclosure proceedings is based on three grounds:



First. Because the Thatcher and Sloan mortgages were fraudulently made by the officers of the Nome Consolidated Dredging Company in pursuance of a plan or scheme, concocted by them to secure a preference to themselves without any regard to the rights of the said Nome Consolidated Dredging Company and without any attempt to benefit it thereby or to keep it as a going concern.

Second. That the said Thatcher and Sloan mortgages were made to secure a largely fictitious indebtedness by the use of spurious notes in pursuance of a combination and plan between the directors and officers of the said Nome Consolidated Dredging Company, to acquire the property and assets of said corporation for themselves and their associates, to be used by a new corporation contemplated to be organized, owned and controlled by them without any regard for the rights of the said Nome Consolidated Dredging Company or its creditors or innocent stockholders.

Third. Because the Nome Holding Company and the Alaska Mines Corporation were organized by the said conspirators as contemplated, and the said assets, real and personal, covered by said mortgages were transferred to said Alaska Mines Corporation, through the said conspirators, acting as officers and agents of said corporations, with full knowledge and notice of all of the fraudulent actions connected with said proceedings.

In order to assist the court in arriving at a better understanding of the facts in the case, we deem it advisable to refer more specifically to the record, as the appellant in this case in support of its motion for a receiver rests its case largely upon the testimony of appellees, E. E. Powell and George D. Schofield, together with the exhibits set out in the transcript. We submit that most of the facts are undisputed, except by general denials in the answer of said Alaska Mines Corporation. The record abounds with admissions of acts and conduct on the part of appellee Powell that conclusively proves fraud.

#### **QUESTIONS OF FACT.**

The testimony offered in this case can be subdivided and considered in three divisions:

First: Facts showing or indicating fraud on the part of Powell and his associates.

Second: Facts showing or indicating notice, actual or constructive to the appellee, Alaska Mines Corporation, now claiming ownership and possession as a bona fide purchaser for value without notice.

Third: Facts showing or indicating the necessity for appointment of a receiver herein.

1. *Facts showing or indicating fraud on the part of Powell and his associates.*

(1) Powell's fraudulent plan or scheme as outlined in the deposition of George D. Schofield (Tr. pp. 91 to 99).

(2) Spurious notes. See Schofield's deposition (Tr. pp. 100, 102 and 110).

(3) Powell's plan contemplated foreclosure before the mortgages were given. See Schofield's deposition (Tr. p. 96).

(4) Powell's plan contemplated double purpose in giving mortgage. See Schofield's deposition (Tr. p. 102).

(5) Powell's plan contemplated the freezing out of stockholders and creditors. See Schofield's deposition (Tr. p. 110).

(6) Powell got the Flat Creek dredge for a small consideration compared to its real value by reason of fraudulent suits. See Schofield's deposition (Tr. p. 112).

(7) Powell admits discussing spurious notes with Schofield. See Powell's first deposition (Tr. p. 86).

(8) The home office of the Nome Consolidated Dredging Company at Seattle had never heard of the Sloan mortgage in October, 1915, more than a year after it was made out according to the annual statement. See Powell's affidavit (Tr. p. 192).

(9) Newton, Powell and Eisenlohr control the Nome Holding Company. See Powell's second deposition (Tr. pp. 120 and 123).

(10) It was Powell's plan to wipe out all the assets, real and personal, of the Nome Consolidated Dredging Company. Powell's deposition (Tr. p. 134).

(11) Powell and his brothers owned two-thirds of all the Alaska Dredging Company. See Powell's first deposition (Tr. p. 67).

(12) Under the reorganization plan, Powell is now the general manager of the Alaska Mines Corporation, with an annual salary of \$6,500. See Powell's deposition (Tr. p. 135).

(13) At the time of the foreclosure of the Thatcher and Sloan mortgages in 1915, Powell had sued and obtained judgment and sold the assets of the Anvil Hydraulic & Drainage Company, one of the former companies that owned practically all the mining land that was leased to the Nome Consolidated Company. See Powell's first deposition (Tr. p. 75).

(14) In the fall of 1915 Powell transferred the assets secured under the Thatcher and Sloan foreclosure proceedings to the Nome Holding Company and took a mortgage in his own name for \$200,000, which is a lien against said assets of record. Powell is trustee in said \$200,000 mortgage for the same identical creditors described in the Thatcher and Darling mortgages, showing conclusively that the



foreclosure proceedings were not brought and conducted to pay the indebtedness due under the mortgages, but for the sole purpose of obtaining said assets. See Powell's deposition (Tr. pp. 115 and 116).

(15) Powell holds a general power of attorney for the Nome Holding Company. See Powell's second deposition (Tr. p. 122).

(16) The Alaska Mines Corporation was organized for the purpose of taking over the property as contemplated in the original plan of Powell and his associates. See Powell's second deposition (Tr. p. 124).

(17) T. I. Crane, who was a preferred stockholder in the Nome Mining Company (also one of Powell's former companies), was the moving spirit and organizer of the appellee, Alaska Mines Corporation. See Powell's second deposition (Tr. pp. 123, 124 and 130).

(18) That the directors and officers of the Nome Consolidated Dredging Company were made preferred creditors. See the list of note owners and holders in the decree attached to the complaint (Tr. pp. 23 and 24).

(19) Part of the scheme was the writing of Schofield's letter which was sent by Powell to some of the stockholders, to whom they desired to boost the reorganization plan. See letter exhibit, Powell's first deposition (Tr. p. 48).

(20) The plan, scheme and conspiracy to confiscate the assets of the Nome Consolidated Dredging Company is clearly shown by the agreement, signed by Powell, Newton, Eisenlohr, Schofield, Bremer and Sloan. See Exhibit 1, Powell's second deposition (Tr. p. 139).

(21) The contemplated foreclosure was made with intent to transfer to the Nome Holding Company, which was then being organized at Seattle, Washington, by Powell's brother and others under his directions. This is conclusively shown by Powell's letter to his brother, set up as an exhibit to Powell's first deposition (Tr. p. 73).

(22) Powell says he bought the property at the Marshal's sale with intention to deed it to the new company then being organized. See Powell's first deposition (Tr. p. 81).

(23) The Sloan notes were spurious and the payees' names were written in at the time of the trial. See Powell's first deposition (Tr. p. 85).

(24) The plan was to freeze out the stockholders as well as the creditors of the Nome Consolidated Dredging Company. See Schofield's deposition (Tr. p. 110).

(25) The Nome Consolidated Dredging Company was insolvent and threatened with insolvency. See Powell's affidavit (Tr. p. 180); also see 1915 annual statement (Tr. p. 37), showing debts, \$386,547.59, and this does not include the Sloan or Darling notes

as shown by the statement in Powell's affidavit (Tr. p. 192).

(26) The assets of the Nome Consolidated Dredging Company had a real value of only \$200,000 at the time the mortgages were given in September, 1914. See Powell's first deposition (Tr. p. 81).

(27) Eisenlohr, Newton, Bremer and Powell have been associated together since the organization of the Wonder Dredging Company (also one of Powell's former companies), more than ten years ago. See Powell's first deposition (Tr. p. 77).

(28) That Powell was acting during the foreclosure proceedings as an officer of the Nome Consolidated Dredging Company and therefore in a fiduciary capacity for the stockholders and creditors. See sworn annual statement of Nome Consolidated Dredging Company for 1915 (Tr. pp. 38 and 39), being an exhibit offered in evidence, which is signed by E. E. Powell in October, 1915, several months after foreclosure proceedings were completed. Also see affidavit of W. A. Gilmore, wherein it is undisputed in record that said E. E. Powell paid the Scheid & Company bill of \$121 the day before the Marshal's sale, in order to prevent contemplated involuntary bankruptcy proceedings (Tr. p. 236).

2. *Facts showing or indicating notice, actual or constructive, to the appellee, Alaska Mines Corporation.*

(1) Articles of incorporation of Nome Holding Company. See Powell's first deposition (Tr. p. 68).

(2) Nome Holding Company organized June 16, 1915, at Seattle, Washington, seven days before the Thatcher foreclosure suit was commenced.

(3) Powell is shown to be the organizer of the Nome Holding Company by his letter to his brother, dated July 26, 1915. See exhibit to Powell's first deposition (Tr. p. 73).

(4) Capital stock of Nome Holding Company was 50,000 shares at the par value of \$1.00. See Powell's second deposition (Tr. pp. 71 and 120).

(5) All of the 50,000 shares of the capital stock of the Nome Holding Company were issued to the appellee, E. E. Powell, except 3 shares to the "dummy" incorporators, and part of said 50,000 shares of capital stock was redistributed by Powell to his fellow co-conspirators, Eisenlohr, Newton, Crane and Webster. See Powell's second deposition (Tr. pp. 120 and 121).

(6) Powell admits that he holds 40 per cent of the capital stock of the Nome Holding Company, to-wit: 20,000 shares at a ratio of 80 to 1, which is the equivalent of 1,600,000 shares of the capital stock of the Alaska Mines Corporation. See Powell's deposition (Tr. pp. 121 to 127).

(7) Powell arranged the sale and sold the assets of the Nome Holding Company to the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 125).

(8) The recitals in the deeds of conveyance, Exhibits "C", "D" and "E" attached to the answer of



the Alaska Mines Corporation, show that the court confirmed the Marshal's sale on September 27, 1915; Powell's transfer of the assets to the Nome Holding Company was in October, 1915, during the period of redemption; the Nome Holding Company transferred the said assets, real and personal, to the Alaska Mines Corporation, August 15, 1916, and during the period of redemption; the Marshal deeded to Powell, September 28, 1916 (Tr. pp. 168, 173, 176).

(9) Powell, Newton, Eisenlohr and Crane are all directors of the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 141).

(10) Powell admits in his affidavit that the directors of the Alaska Mines Corporation approved the purchase of the said assets (Tr. pp. 200 and 201).

(11) Powell and Newton were witnesses in the appellant's suit in the Court of Common Pleas in Philadelphia, prior to the organization of the Alaska Mines Corporation. See Powell's second deposition (Tr. p. 137).

(12) Powell, Eisenlohr, Newton and Webster were officers and directors of the Nome Consolidated Dredging Company at the time the mortgages were made and during the foreclosure proceedings, and are such officers yet. See Powell's second deposition (Tr. pp. 138 and 142).

(13) There was no consideration whatever for the transfer from Powell to the Nome Holding Com-

pany of the assets secured by the foreclosure proceedings. Powell simply took a mortgage from the Nome Holding Company to himself for the sum of \$200,000 and conveyed the property to the Nome Holding Company according to the contemplated plan when the mortgages were made (Tr. p. 116).

(14) The only consideration for the conveyance from the Nome Holding Company to the Alaska Mines Corporation was the delivery of a stock certificate for 3,701,820 shares of capital stock of the Alaska Mines Corporation to the Nome Holding Company (Tr. pp. 126 and 155).

(15) What became of, and who votes, the 3,701,820 shares so delivered? See Powell's second deposition (Tr. p. 128).

(16) The date of appellant's judgment in the Court of Common Pleas at Philadelphia was June 5, 1916, and the Alaska Mines Corporation was organized on June 9, 1916.

### *3. Facts showing or indicating the necessity for the appointment of a receiver.*

(1) The conveyances set out as exhibits in the answer of the Alaska Mines Corporation (Tr. p. 143), when compared with the decree of the court in the Thatcher case, set out as an exhibit (Tr. p. 19) to appellant's complaint, show that all of the assets of the Alaska Mines Corporation are the same assets that belong to the Nome Consolidated Dredging Company and were fraudulently, by rea-

son of the foreclosure proceedings, taken from said debtor.

(2) It nowhere appears in the record that the Alaska Mines Corporation has acquired any other assets, except the purchase of a half-interest in a placer claim and dredge hull from one H. Greenberg, upon which the record shows there is a mortgage indebtedness of \$35,000 (Tr. p. 132).

(3) The mortgage liens against the said assets are shown in Powell's second deposition (Tr. pp. 130, 131 and 132).

(4) The Alaska Mines Corporation, on August 4, 1916, a few days before it purchased the assets of the Nome Holding Company as shown by the annual statement filed August 1, 1917, in the office of the clerk of the District Court of Alaska, had an indebtedness of \$406,000 (Tr. p. 229).

(5) That some of the property is being wasted as alleged in appellant's complaint. See the affidavit of W. M. Eddy, showing that the Wonder dredge has been dismantled and most of its parts scattered on the tundra, exposed to the elements (Tr. p. 233).

(6) The appellee, Alaska Mines Corporation, alleges it intends to mine the gold from the ground in dispute and appropriate it to its own use. See affidavit of W. M. Eddy (Tr. p. 234). Also see Powell's second deposition where he boastfully states that they intend to mine the ground and keep the gold (Tr. pp. 134 and 135).

(7) The Alaska Mines Corporation is using and intends to use the power plant to its maximum capacity. See the affidavit of J. H. Miles (Tr. p. 202).

(8) Such use of the power plant, under such conditions, would soon wear and waste the said plant and render it valueless. See affidavit of W. M. Eddy (Tr. p. 235).

From the foregoing references, the court can readily see the clever and underhanded scheme and method Powell and his pet associates took in trying to get rid of bothersome creditors and obnoxious and inquisitive stockholders. Early in 1913, the record shows, Powell and his personal attorney, Schofield, who was also the attorney for the Nome Consolidated Dredging Company, formulated the scheme and drew up and executed a copy of the contemplated mortgage which Powell took East with him in the winter of 1913 and spring of 1914, where he confided and planned with Newton, Eisenlohr and others. The appellant was getting troublesome by beginning its suit at Philadelphia. The whole plan was agreed to and Powell returned to Nome in the summer of 1914 and in September the mortgage for \$200,000 arrived as planned, but the bank at Nome refused to get tangled up with the spurious notes, so after considerable telegraphing an additional mortgage (Thatcher mortgage) for \$25,000 was



executed by Powell, which also included alleged claims of Newton, Eisenlohr, Webster and others interested in the general scheme.

The record conclusively shows it was the intent and scheme all through to engulf and annihilate the Nome Consolidated Dredging Company and not to aid it in its financial difficulties or mining affairs. The mortgages were planned, not for security, not to assist the corporation, but simply to embarrass, wreck and financially swamp it, so that by the contemplated foreclosure its assets could be gobbled by the wreckers—its confidential officers and agents.

By scheming and conniving with Ewing and Sloan, the record shows that Powell got possession of nearly a hundred thousand dollars' worth of the Nome Consolidated Dredging Company's property for the paltry sum of \$4,000. This was part and parcel of the general plan of Powell and his associates to wipe out and annihilate the Nome Dredging Company. The notes were given in September and most of them fell due in December without any hope or anticipation of ever being paid from any fund available. The whole foreclosure proceedings were rushed and hurried by Powell, acting for all the parties thereto. The troublesome bank was paid off in full before the foreclosure proceedings were begun; the Nome Mining Company had a prior first lien mortgage of \$100,000 on the property, yet to prevent delay, it was not named as a party to the Thatcher foreclosure proceedings by Powell; the

Nome Holding Company was rapidly being organized at Seattle by Powell's dummy incorporators, including a pliant brother.

Everything was done that could be done by Powell and his associates to get the plan in execution before the appellant could perfect its judgment in the courts of Pennsylvania and get into the courts at Nome. Small troublesome creditors in the town of Nome were paid off by Powell during the summer of 1915, while the foreclosure proceedings were pending, in order to prevent bankruptcy proceedings. The transfers of said assets were made to the Nome Holding Company by Powell without any consideration whatever, and a \$200,000 mortgage taken by Powell in his own name as trustee and placed of record. A general power of attorney was issued to Powell and all of the 50,000 shares of the capital stock of said Nome Holding Company was issued to Powell, except 3 shares to the dummy incorporators. Thus armed, Powell started East to invade the financial centers, where his fellow schemers impatiently sat waiting his arrival. Immediately Crane, Eisenlohr and Newton got busy, and with the aid of more dummies, incorporated the Alaska Mines Corporation with a capital stock of 10,000,000 shares at \$1.00 per share, with nothing paid in.

The dummy incorporators were immediately replaced by Crane, Eisenlohr, Newton, Powell and others, and Powell thereupon transferred all of said

assets from the Nome Holding Company (himself and associates) to the Alaska Mines Corporation (also himself and same associates), subject to the \$200,000 mortgage (also himself and same associates) for 3,701,820 shares of the capital stock of said Alaska Mines Corporation. Not a dollar changed hands. The only working capital the concern ever had was from the sale thereafter of some 600,000 shares of capital stock, sold on the curb in New York, leaving over 5,000,000 shares still in the treasury.

Thus we see the management of the Alaska Mines Corporation by the voting power passed into the control of Powell to do as he pleased for himself and fellow plotters. Of the seven directors of the Alaska Mines Corporation, Crane, Eisenlohr, Newton and Powell constituted the majority. In addition, Powell holds its general power of attorney and is its general manager at an annual salary of \$6,500 per year.

So we find Powell in possession of all the mining land formerly owned by the Anvil Hydraulic & Drainage Company, upon which a royalty or rent through lease is to be paid by the working or operating company to him and his associates. We find him as the Nome Holding Company with voting power and complete control of the Alaska Mines Corporation, with general authority from both concerns and a luscious salary of \$6,500 for incidentals, while the worried creditors and deluded stockhold-

ers of his former wrecked companies stalked the earth looking for justice.

#### QUESTIONS OF LAW.

**The court erred in denying and refusing appellant's motion for a receiver.**

Out of such a record of facts three legal questions arise for the court to pass upon in deciding this appeal, to-wit:

1st. Fraud in preferring the officers and stockholders as against appellant and other creditors of the insolvent corporation.

2nd. Notice on the part of the Alaska Mines Corporation of such fraud and of the rights of appellant.

3rd. Necessity for a receiver and the duty of the court to appoint.

*1. Fraud in preferring the officers and stockholders as against appellant and other creditors of the insolvent corporation.*

All of the errors assigned can be discussed under the ruling of the court in refusing to grant the appellant's motion for a receiver, pendente lite. The appellant contends that Powell and his associates fraudulently preferred themselves by their acts as against the appellant, and thereafter, in organizing the Alaska Mines Corporation as part and parcel of



their fraudulent scheme, the said Alaska Mines Corporation took the property with full notice and knowledge of the fraudulent acts, and that the said Alaska Mines Corporation is now in possession, using and controlling the assets, real and personal, that should belong to the creditors of the Nome Consolidated Dredging Company.

This suit is brought in pursuance of the well-known right of a judgment creditor to set aside a fraudulent conveyance by a debtor, it being a recognized rule of equity that judgment creditors of an insolvent corporation may sue in equity to impeach or set aside a conveyance, transfer or mortgage of property, or confession of judgment to it for the benefit of its directors or other officers, if made while the corporation was insolvent, or in contemplation of insolvency, and is void against such creditors on that ground, or if made without consideration, or if made with intent to hinder or delay the creditors.

The above rule is supported by all the modern text writers on private corporations.

Directors or other officers of a corporation cannot, by conveyance, mortgage or otherwise, when the corporation is insolvent, obtain, as creditors of a corporation, any preference over other creditors and if they attempt to do so other creditors are entitled to relief in equity.

Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496;  
2 Cook on Corporations, Sec. 653;  
Railway v. Ham, 114 U. S. 587;

Grantham v. Railway Co., 102 U. S. 148;  
 Richardson's Ex'r. v. Green, 133 U. S. 30;  
 Oil Co. v. Marbury, 91 U. S. 587.

The opinion in the Sutton case (*supra*), is by Justice Harlan of the Supreme Court of the United States, sitting as a Circuit Court Justice in the 7th Circuit Court of Appeals, and is a clear and elaborate enunciation of the law as applicable to the facts in the case at bar. The facts in the Sutton case were somewhat similar in that certain members of a certain family owned stock in both the manufacturing company and the mortgage company. In discussing the fiduciary relations and obligations of directors and officers of insolvent corporations, the court at page 502, says:

“In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is ‘to act up to the end or design’ for which the corporation was created (1 Bl. Comm. 480), and when they can no longer do so, their function is to hold or distribute the property in their hands, for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and con-

trol of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others, and, instead of being relaxed, should be rigidly enforced in cases of breach of duty or trust by corporate managers, seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule, as applied to those entrusted with the management of corporate property.”

The Sutton case is an elaborate brief in itself and the court clearly distinguishes the line of cases, holding that a mortgage made in good faith without intent to hinder, delay or defraud other creditors, but for the sole purpose of preferring a particular creditor, while the corporation is a going concern, from the line of cases which hold that the officers and directors of an insolvent corporation cannot with intent to hinder, delay and defraud other creditors, and in bad faith, through any design or device, prefer themselves by such mortgages.

In the case at bar it is admitted by both Powell and Schofield, that it was the intent to prefer the officers and directors of the Nome Consolidated Dredging Company under the plan and scheme of completely wiping out its assets by a contemplated foreclosure.

“For the directors or contracting officers of a corporation, when insolvent, to divert its property or pledge its credit to the payment or securing of their individual debts, is a fraud and breach of trust toward the corporation, its shareholders and a fraud as to its creditors.”

10 Cyc., p. 799.

“The governing principle is that directors and managers of an insolvent corporation are the trustees of the funds as well for the creditors as for the corporation and are bound to apply them pro rata, and cannot use them to exonerate themselves to the injury of other creditors.”

10 Cyc., p. 1256.

In *Penn. Railroad Co. v. Pedrick*, 222 Fed. p. 75, the court says:

“It is hardly supposable that the officers and directors of a corporation, (insolvent), are at liberty, without liability to the creditors of such corporation, to take its assets and convert them to their own use in payment of the debts of the corporation to themselves and a favored few of the creditors \* \* \* It must be that there is an implied contract on the part of the directors and officers of a corporation to, at least, use reasonable care and diligence to see to it that the assets of the corporation are not dissipated, or wasted, or misapplied, or applied to the payment of their own individual claims against the corporation when it is insolvent or its insolvency is imminent, \* \* \* if such is not the law, then officers of a corporation, including the directors whose duty it is to use reasonable care and diligence to apply the assets of a corporation to the payment of its just debts and obligations without preference in case of actual or impending insol-



veney, may create liabilities of the corporation to themselves, the other creditors being ignorant of such action, and in case of actual or impending insolvency, take advantage of their confidential and trust relations and the knowledge that they alone have of actual conditions, use the entire assets of such corporation to pay themselves to the exclusion and great damage of other creditors. Such a condition of the law would be intolerable."

In *Koehler v. Black River Falls Iron Co.*, 67 U. S. 715, it was held that the directors of a corporation, executing a mortgage securing to themselves an advantage not common to all the stockholders, were guilty of an unauthorized act, violating their trust. In that case the invalidity of the mortgage was asserted by the corporation itself, as being a fraud by the directors on other stockholders and the Supreme Court said:

"Instead of necessarily endeavoring to effect a loan of money, advantageously for the benefit of the corporation, its directors, in violation of their duty and in betrayal of their trust, secured their own debts to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management."

The allegations of the complaint are, and the record overwhelmingly supports the allegations of the complaint, that E. E. Powell, acting as vice-president of the Nome Consolidated Dredging Company, together with M. W. Newton, president, and Louis Eisenlohr, director of the company, on or before September 14, 1914, entered into a combination

together, to secure the property of the Nome Consolidated Dredging Company for themselves by means of placing on the property of the corporation, mortgages, foreclosing the same and obtaining the property of the Nome Consolidated Dredging Company at the lowest price possible, by reason of fictitious notes to be used at the sale, and thereafter organizing a new corporation which would carry on the business then attempted to be carried on in the name of the Nome Consolidated Dredging Company. This plan was consummated through said Powell, vice-president of the company and its general manager, who executed the mortgages to secure notes to the extent of \$225,000, which said notes were issued in blank, most of which notes were retained by said Powell and the payees' names written therein just prior to the foreclosure proceedings; that these notes were largely made to secure a fictitious indebtedness and were made for the purpose of covering the property with a large amount of apparent indebtedness to prevent other creditors from stepping in and securing themselves; that thereafter, in pursuance of the plan indicated, Powell began and conducted the foreclosure proceedings, and by use of a cleverly prepared decree, the whole property of the Nome Consolidated Dredging Company was sold at the earliest possible moment to said Powell for the small consideration of \$23,000.

These facts constitute an actual fraud upon the creditors of the corporation and the proceedings

were void as to them. How ridiculous it is for appellees to contend to the court that the officers and directors of the Nome Consolidated Dredging Company had a right under these circumstances to prefer themselves as creditors by mortgages, to cover alleged indebtedness. The mortgages were not made in good faith, but were made with the intent and in accordance with the plan and scheme to obliterate the assets of the Nome Consolidated Dredging Company and to prevent it from operating as a going concern.

In *Jackson v. Ludeling*, 88 U. S. 616, the Supreme Court says:

“They (directors), had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice or at the lowest price possible. They could not rightfully place themselves in position in which their interests were adverse to those of the stockholders or bondholders and the defendant could take nothing from such sale.”

This was exactly what the directors of the Nome Consolidated Dredging Company did in the case at bar. This is shown by the testimony of E. E. Powell (Tr. p. 134) as follows:

“Q. Now, in 1915 in the Thatcher, Darling foreclosure suits, all of the assets of the Nome Consolidated Dredging Company were included in that foreclosure, were they not, subject to that mortgage?

A. Yes, sir.

Q. And bid in all of the assets?

A. Yes, sir.

Q. Has the Nome Consolidated Dredging Company any property anywhere that you know of?

A. It has not.

Q. And didn't have after that foreclosure?

A. No, sir.

Q. Either in Alaska or elsewhere?

A. No, sir."

Railroad v. Howard, 7 Wall. 292, was a case also, of foreclosure of a mortgage and sale which was had under an arrangement advantageous to the mortgagees and stockholders, under which the mortgagees, according to their priority, got a certain percentage of their debt and certain stockholders, a residue of the proceeds. The sale under the mortgage and foreclosure was held fraudulent against general creditors unsecured by the mortgage.

For another case that is on all fours with the case at bar, we cite the court to the case of Central Georgia Railway v. Paul, 93 Fed. page 878. In this case a plan of re-organization had been entered into between certain stockholders and secured creditors of an insolvent corporation, whereby all the property of the corporation was sold by foreclosure and transferred to a new corporation, the stockholders of the old corporation retaining their interest and rights by virtue of their interest in the old corporation, and it was held to be a fraud on an unsecured creditor of the old corporation; it was further held that such creditor might hold the new corporation for his debt.



In *Wardell v. Union Pacific Railroad Co.*, 103 U. S. 651, Justice Field said:

“All arrangement by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the Courts for consideration.”

We see the two lines of cases clearly distinguished by Cyc. in the following quotations:

“It is to be regretted that some of the American Courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own shareholders, but may prefer such as are its own directors.”

10 Cyc., 1253.

This is the doctrine relied upon by the appellees and they will no doubt in their brief, cite many decisions to uphold the same, relying among others on the case of *Anderson v. Bullock Co. Bk.*, (Ala.) 44 L. R. A. 766, but this is not the better doctrine and is not in accordance with the great weight of authority.

“The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is

insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in view of its probable suspension, they, (its officers), cannot use those assets to prefer themselves, as creditors or sureties, in respect of past advances, to the prejudice of its general creditors.”

10 Cyc., 1255, and numerous cases cited in support of the rule.

The case of *National Bank v. Johnson*, 219 Fed. 89, cited and relied upon by the appellees in the court below, is clearly not in point in this case, because the court in that case found that the preference given to the officers of the company were not tainted with fraud, either constructive or actual.

The cases cited and relied upon by the appellees, were cases that are predicated upon the assumption of fact, that the preference made or given to the directors or officers of the corporation, were made or given without any intent to defraud creditors and usually for the purpose of securing funds or credit to keep the corporation a going concern. They cited and relied upon 7 R. C. L. Sec. 774. The very concluding lines of said paragraph states:

“Where the officers of a corporation prefer themselves as creditors, the court will, however, closely scrutinize the bona fides of the transaction and will cast on them, as in the case of other dealings between a corporation and its officers, the burden of showing good faith.”

The rule relied upon by them does not fit the facts in the case at bar. The record here discloses

that the officers and directors of the Nome Consolidated Dredging Company planned to place the mortgages of record with the sole intention of foreclosure so as to acquire the property with the very purpose and intent of organizing such a company as the Alaska Mines Corporation to hold the same for them and their benefit. Not a single case cited by counsel for appellees in the court below, holds that the officers and directors of an insolvent corporation may prefer themselves to other creditors with intention to defraud.

*2. Notice on the part of the Alaska Mines Corporation of such fraud and of the rights of appellant.*

An examination of the record in this case will clearly convince the court that the Alaska Mines Corporation was a creature of Powell, Eisenlohr, Newton and Crane. It was organized by them as part and parcel of their scheme, originally conceived and planned prior to the time the mortgages were executed and given.

The organization of the Nome Holding Company was nothing more than a dummy corporation, created by Powell, Newton, Eisenlohr and others for the same purpose. This is conclusively shown by Powell's letter to his brother (Tr. p. 73) as follows:

“Nome, Alaska, July 26th, 1915.

Mr. F. S. Powell,  
# 324 N. Y. Block,  
Seattle, Wash.

Dear Brother:—

On receipt of this, if you have got your organization completed, get into communication with Mr. M. W. Newton (copy of whose letter I herewith enclose you), as he will probably write you and request you to put him on the Board of three Trustees; this gives you a majority there at Seattle to transact business with.

Let Mr. Trenholme resign and that will leave you and Dutton on the Board. Mr. Trenholme probably does not want to be bothered with it. See my letter to Mr. Newton.

Write Mr. Newton and tell him you are ready to put him on and when this is completed, I will turn the property over to the company. Also send me in my authority to transact business, the same authority given me in the N. C. Company.

(Signed) E. E. POWELL.”

The above and foregoing letter was written during the foreclosure proceedings and shows conclusively that Powell, Newton and others were organizing the Nome Holding Company for the purpose of taking over the assets of the Nome Consolidated Dredging Company. In his deposition, Powell frankly admits that he transferred all of the property to the Nome Holding Company in the fall of 1915, without any consideration whatever, except that he took a mortgage from the Nome Holding Company for \$200,000 and placed it of record.

That Powell, Newton, Eisenlohr and Crane, in accordance with their plan and scheme, organized



the Alaska Mines Corporation is conclusively shown by the testimony of Powell on page 124 of the Transcript:

“Q. Now did you know that the Alaska Mines Corporation was going to be organized before the 9th day of June?

A. Yes, sir.

Q. Who told you?

A. Why, Mr. Crane. I had a talk with him several times about organizing a company.

Q. After you transferred this property to the Nome Holding Company and got a mortgage back, you went to New York and Philadelphia that fall, didn't you?

A. Yes, sir.

Q. And you went back there for the purpose of organizing a new company to exploit these properties?

A. Yes. I went back to see what I could do and we finally got down to a place where they wanted me to sell their property for them if I could.

Q. You went to Mr. Gayley to get him to organize a company to exploit this property?

A. I went to him after awhile; I also went to several gentlemen.

Q. And as a result of numerous negotiations with Mr. Gayley, the Alaska Mines Corporation was organized, was it not?

A. Yes, sir.”

After the schemers had organized their new corporation, the Alaska Mines Corporation, Powell on behalf of the Nome Holding Company, transferred all of the said assets to the Alaska Mines Corporation for 3,701,820 shares of the capital stock of the Alaska Mines Corporation and for no other consideration (Tr. p. 126). The Alaska Mines Corpora-

tion had no other assets. It was organized for the sole purpose of taking over these assets and took title to the same within the year of redemption and before the U. S. Marshal had issued his deed to Powell. Not one dollar changed hands between the companies. The Alaska Mines Corporation was organized purposely to receive a conveyance from the Nome Holding Company and the Nome Holding Company had been organized by the same parties purposely to take the title from Powell. This was constructive notice to said Alaska Mines Corporation. In the face of such a record, how can the Alaska Mines Corporation seriously contend that it was an innocent purchaser for value and without notice?

The Alaska Mines Corporation deraigned its title from the foreclosure proceedings by written instruments that were of record. Thus it had notice of the foreclosure proceedings. Powell purchased the assets at the marshal's sale for \$23,000 and through collusion with Ewing and Sloan, acquired other valuable property belonging to the Nome Consolidated Dredging Company, worth nearly \$100,000.00 for the paltry sum of \$4,000.

In the fall of 1915, Powell swore to an annual statement that was filed in the office of the Clerk in the District Court at Nome (Tr. p. 37), that the assets were worth \$670,906.31. These were the same assets that Powell swore in his deposition on August 25, 1915, and during foreclosure proceedings were worth \$200,000 (Tr. p. 81). These were

the same assets also that Powell, in an annual statement of the Alaska Mines Corporation on August 4, 1916, swore were worth \$2,000,000 (Tr. pp. 228-229). By the fraudulent acts they acquired them for a total of \$27,000. The Alaska Mines Corporation took title from Nome Holding Company during the period of redemption and were thus put on inquiry.

Powell, Newton, Eisenlohr and Crane owned the majority of the stock of the Nome Holding Company and thus owned and controlled the 3,701,820 shares of the capital stock of the Alaska Mines Corporation. This was all of the stock of the Alaska Mines Corporation that was issued, except about 600,000 shares that were subsequently sold on the curb in New York according to the record.

The appellant contends that the Alaska Mines Corporation, by virtue of its organization by Powell, Eisenlohr, Newton and Crane for the purpose of taking and holding the assets fraudulently acquired, thereby became and is merely a corporation organized by said stockholders to further or carry out their plan to acquire and own the assets of the debtor company; that by reason thereof, the Alaska Mines Corporation had notice of all of the fraudulent acts and doings of Powell and his associates. An entirely different question would arise if the Alaska Mines Corporation had been a stranger corporation already in existence and offered by strangers and had purchased the assets for value. It might then be permitted to claim lack

of notice or knowledge. It might then be within the rule of some of the cases relied upon by it.

In the case of *Wilson Coal Co. v. U. S.*, 188 Fed. 546, the opinion of the court being delivered by Judge Gilbert, the court will find the law of notice to corporations clearly stated as follows:

“Where one who has notice of the infirmity of his own title to land obtained from the government, unites with others to form a corporation and subscribes for nearly all of the stock, conveying the land in payment of his subscription, the corporation is affected with notice of the circumstances, impairing the title and cannot claim protection against a suit for cancellation of the patents as a bona fide purchaser without notice.”

Again in the same case:

“A corporation, which has taken land obtained by entry from the United States, with notice of fraud in its acquisition, cannot defend a suit by the Government for cancellation of the patents, by showing that stockholders purchased its stock in good faith and in ignorance of the defect in the title of the land.”

So we see that it is immaterial that a few innocent persons bought 600,000 shares on the New York curb.

The decision of our Circuit Court in the *Wilson Coal Co.* case (*supra*), was cited with approval by Justice Holmes of the Supreme Court of the United States in the case of *Linn Timber Co. v. U. S.*, 236 U. S. 577. With reference to the notice of corporations in that case we quote the syllabus:



“This court follows the finding of fact of two courts below in this case, that the corporation was a mere tool of the individual organizing and controlling it and holding most of its capital stock, that his knowledge as to fraud was its knowledge, and that the corporation was a party to an effort to conceal the title until the period of limitation. had expired.”

The Supreme Court also in this Linn Timber Co. case, cited with approval the case of McCaskill Co. v. U. S., 216 U. S. 504. In the latter case, the opinion of the court was delivered by Justice McKenna, and is a clear statement of the law applicable to the facts of the case at bar. In this case the Supreme Court of the United States clearly distinguished the case of Frenkel v. Hudson, 82 Ala. 162, and the case of Innerarity v. Bank, 139 Mass. 332, and other cases relied upon by the appellees in the court below. We particularly direct the court's attention to pages 514 and 515 of the opinion, wherein the Supreme Court states:

“The growing tendency is therefore exhibited in the court to look beyond the corporate form to the purpose of it and to the officers which are identified with that purpose”,

also quoting with approval the doctrine laid down by Cook on Corporations, and reaffirming the principles enunciated in the case of Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

Powell's act in transferring all of the assets of the Nome Holding Company, including its good will, etc., to the Alaska Mines Corporation for stock in said corporation, was contrary to public policy, ultra

*vires*, and a fraud in itself, and was enough to put the Alaska Mines Corporation on inquiry.

Clark & Marshall on Private Corporations,  
Vol. 1, Sec. 196;

McCutcheon v. Merz Capsule Co., 71 Fed. 787.

A corporation is not a bona fide purchaser for value when it only issues its stock in payment for the property purchased.

2 Cook on Corporations, Sec. 764;

Rodgers v. N. Y. etc. L. Co., 32 N. E. 27.

“A sale of the whole property and trade of a company, or of any property, known to be necessary to carry on its business, would not be binding, even in favor of a person acting in good faith, unless the circumstances under which the transaction would be proper, actually exist. A person dealing with the agents selling the property would not be entitled to assume the existence of circumstances of so unusual a character.”

Morawetz on Private Corporations, Sec. 606;

Rollins v. Clay, 33 Me. 132.

A new corporation is affected with knowledge possessed by its promoters with respect to title to property which they convey to it.

“Where a director who had purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his stock subscription for such stock, it was held that the new company was affected with notice

of circumstances impairing the title of the party so conveying the lands to it, and could not claim to be a bona fide purchaser without notice."

10 Cyc. 1059;

Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; 77 Am. Dec. 311.

In a strict sense a corporation can only acquire constructive notice or knowledge as it must act through officers and agents. Constructive notice is notice in law. Constructive notice is generally a conclusion of law from a state of facts established or admitted. So in this case, Powell admits that he, Newton, Eisenlohr, Crane and others contemplated all the acts that were done in advance of the giving of the mortgages. He also further admits that he and Newton were witnesses at the trial of appellant's case in Philadelphia at or about the time of the organization of the Alaska Mines Corporation. This was certainly constructive notice to the Alaska Mines Corporation, of which they were the promoters and owners. Ordinarily it is very difficult to prove fraud, but in this case the transcript fairly bristles with admitted acts and things which conclusively prove the fraud alleged in the complaint notwithstanding the denials of the answer.

The appellees in the court below cited numerous cases to show that various kinds of notice to officers, directors and agents of corporations, do not constitute notice to the corporations, citing almost all exceptions to the general rule and yet they overlook the plain facts in this case that the Alaska Mines

Corporation was the creature of the conspirators, organized as part and parcel of the scheme to rob the creditors and stockholders of the Nome Consolidated Dredging Company, and that a majority of the directors of the said Alaska Mines Corporation, to wit: Crane, Eisenlohr, Newton and Powell had notice of the fraudulent acts or some of them, and two of these directors, Powell and Newton, were witnesses in the court in Philadelphia and knew of the rights of the appellant and that the Alaska Mines Corporation is controlled by the Nome Holding Company.

3. *Necessity for a receiver and the duty of the court to appoint.*

Section 1595 of the Compiled Laws of Alaska provides that a receiver may be appointed in a civil action on the application of either party, when its rights to the property which is the subject of the action or proceedings and which is in the possession of the adverse party, are probable, and the property or its rents, or profits, are in danger of being lost, materially injured or impaired.

The party seeking the relief of the appointment of a receiver, must show that he has a probable right or interest in the property or fund involved in litigation and that there is danger of it being lost, dissipated or wasted.

In the case at bar, the appellant has shown that he is a judgment creditor, having a large judgment



of record unsatisfied against the debtor company, whose property was fraudulently taken by its officers and now admitted to be in the possession of the Alaska Mines Corporation, controlled by them.

“A receiver may be appointed at the suit of a judgment creditor of a corporation for the purpose of reaching the equitable assets of the corporation and subjecting the same to the satisfaction of the judgment when there are assets which should be applied to its payment and the creditor has exhausted his legal remedies, or the circumstances are such that to deny the application will lead to a wasting or loss of the assets which might be made available for the payment of debts, and which cannot be availed of in any other manner as satisfactorily as by the appointment of a receiver.”

Clark & Marshall on Private Corporations,  
Vol. 3, p. 2397;

3 Cook on Corporations, Paragraph 863 and  
notes;

8 R. C. L. p. 36, Sec. 40.

“A judgment creditor who has exhausted his legal remedy may pursue in a court of equity, any equitable interest, trust or demand of his creditor, in whomsoever hands it may be.”

8 R. C. L. p 6, Sec. 5;

Candler v. Pettit, 19 Am. Dec. 399.

“The appointment of a receiver upon a creditor’s bill is a usual practice and is almost a matter of course where the object of the bill is to reach personal assets, and in this class of cases, receivers are almost uniformly granted before answer.”

8 R. C. L. p. 36, Sec. 40.

“It is a well established practice to appoint a receiver of the defendant’s property in aid of a creditor’s bill. Such appointment is discretionary with the court, and is usually made as a matter of course, where the property is in danger of waste.”

12 Cyc., p. 49.

The record in this case shows that most of the assets involved in this litigation, consist of personal property in the nature of dredges and an electric power plant, together with leases on certain mining claims and a few mining claims of doubtful value. The record shows that these assets are encumbered by mortgages, amounting to over \$300,000, together with other unsecured indebtedness, belonging to the Alaska Mines Corporation. The appellees filed several affidavits to make a large showing that they had expended large sums of money in repairing and improving the personal property, but the fact remains that the record is uncontradicted that the constant use of the power plant will wear out and deteriorate the said plant and in time make it worthless. The record also shows that about the only valuable placer claim owned by the Nome Consolidated Dredging Company at the time the assets were taken, was the Carnation Group, upon which the Alaska Mines Corporation is now engaged in mining and extracting the gold and appropriating it to its own use.

It is appellant’s contention that by reason of their fraudulent acts, the Alaska Mines Corporation today, is in possession of property wrongfully taken

from appellant's judgment debtor, and that appellant is entitled to have the said property preserved, pendente lite, so that on the final hearing of the case, the said property can be sold and distributed in satisfaction of appellant's judgment.

The necessity for the appointment of a receiver is clearly shown in the Transcript, pages 134-135:

"Q. The Alaska Mines Corporation now has two dredges operating hasn't it, at the present time?

A. Yes, sir, one on Bourbon Creek and one on Flat Creek, both mining under full swing and using the power plant that was sold under the Thatcher foreclosure. The Alaska Mines Corporation is about to complete another dredge, known as the Greenberg or Bessie dredge on Holyoke, and expects to operate that very soon. It is the same size as the other two dredges. It is the intention of the Alaska Mines Corporation to operate all three dredges and mine as rapidly as possible with them as soon as they can. They may not get to it this fall. It is the intention of the Alaska Mines Corporation to operate the remainder of this mining season with these two dredges that are now working.

Q. And the Alaska Mines Corporation intends to appropriate and take all the gold dust and gold extracted and keep it?

A. Yes, sir.

Q. And it doesn't recognize the Nome Consolidated Dredging Company as having any interest whatever, in the output of the claims, or the output of the dredges?

A. No, sir.

Q. Or the rental of the power plant?

A. No, sir."

Why should the court permit the Alaska Mines Corporation in the face of the fraud so conclusively shown, to use and operate the property belonging to the Nome Consolidated Dredging Company that should be held for the creditors and stockholders thereof?

By permitting the said Alaska Mines Corporation to remain in the possession and use of said assets, the court is allowing the said Powell, Newton, Eisenlohr and Crane to profit by their fraudulent acts so clearly proven.

There is no serious dispute in the transcript and under the admissions of Powell and Schofield, the appellant must prevail on the final hearing of this action; therefore, the court should grant the relief prayed for by appointing a receiver to take possession and hold the property, *pendente lite*.

If the court has reached the conclusion that the making and giving of the mortgages and the foreclosure proceedings and the subsequent organization of the Nome Holding Company and the Alaska Mines Corporation, and the conveyances through them, were all a part and parcel of the fraudulent plan and scheme of the officers and directors of the Nome Consolidated Dredging Company, and that the Alaska Mines Corporation took the title thereto with notice of the fraudulent acts and doings of Powell and his associates, then in deciding the question of whether or not the court should grant the appellant's motion for a receiver, *pendente lite*, in considering the necessity for a receiver, we submit



the court should have no difficulty in finding from the transcript that the only assets of any value, now in the possession or under the control of the Alaska Mines Corporation are the very assets that were taken from the Nome Consolidated Dredging Company by the fraudulent acts of Powell and his associates; that the real value of said assets is not to exceed \$200,000, consisting of dredges and a power plant and other incidental property, scattered over the tundra in the Nome mining district; that said property has been encumbered by two mortgages, aggregating \$300,000. The court must also find it to be a fact as shown by the annual statement of the Alaska Mines Corporation, filed on the 1st day of August, 1917, that it had an indebtedness of \$406,000. The court must also conclude from the record that the use of the power plant, running at its maximum capacity for a year or two, pending this litigation, will render the said power plant worthless; that the gold from the said Carnation Group Placer claim will have been mined out and appropriated by the Alaska Mines Corporation, under the control of the said schemers.

That if the appellant prevails at the final hearing of this case, and the court enters its decree, setting aside the said foreclosure proceedings, the appellant would then be entitled to the very relief now sought, which in all probability would be unobtainable by depreciation and dissipation of the assets now in the control of said parties. It is an equitable right that appellant is entitled to have said

assets preserved, pendente lite. The said Alaska Mines Corporation is in a position to further encumber the said assets by mortgages, liens, etc., and this condition should not be allowed to prevail. That by refusing to appoint a receiver, the lower court permitted Powell and his associates, under the guise of his corporate name, to have the use and benefit of the Nome Consolidated Dredging Company's property, pendente lite. Alaska has no statutory right of lis pendens against personal property. There is no other way of protecting appellant's rights there except by a receiver.

Seldom, if ever, will the court have an opportunity of reading a transcript that so thoroughly abounds in fraudulent acts of trusted officers and directors of a corporation, scheming and planning to annihilate the corporation and appropriate its assets to their own benefit, as is found in the transcript of this case. To permit them to prosper by the result of their fraudulent acts, would be in violation of every principle of equity and justice.

We submit the court should reverse the ruling of the Trial Court and enter an order, directing the lower court to grant the appellant's motion for a receiver, pendente lite, and thus preserve the property so that, at the final hearing, the appellant will not lose the beneficial result of the litigation.

Respectfully submitted,

WILLIAM A. GILMORE,

T. M. REED,

*Attorneys for Appellant.*



No. 3076

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IN THE  
**United States Circuit  
Court of Appeals**

FOR THE NINTH CIRCUIT

---

AMERICAN MANGANESE STEEL COMPANY,  
a Corporation, *Appellant,*

vs.

ALASKA MINES CORPORATION, a Corporation,  
*Appellee.*

---

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF  
ALASKA, SECOND DIVISION.

---

BRIEF FOR APPELLEE.

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AMERICAN MANGANESE STEEL COMPANY,  
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DISTRICT COURT FOR THE DISTRICT OF  
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---

BRIEF FOR APPELLEE.

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STATEMENT.

Appellant's statement of the case consists principally of an almost *verbatim* statement of the allegations of its complaint in the case, using for that purpose, eleven of the fifteen pages of its brief covering its statement. It dismisses appellee's answer to the complaint, covering fourteen pages of the transcript of record, with a ten-line statement, and it covers the

balance of the 259 pages of the transcript of record in a little over three pages of its brief. None of the contents, nor even the substance of the numerous affidavits filed by appellee in opposition to the motion for a receiver, *pendente lite*, is given in the statement, and very little thereof is even referred to anywhere in the brief, although the decision of the lower court was based upon the showing made by these affidavits, together with the denials in appellee's answer, and we believe this court will base its decision on this appeal upon the same showing.

It will be necessary for us to refer at length in our argument to these affidavits, and we will not, therefore, state their contents at this time; but we wish, however, before making our argument, to call the court's attention to some very material matters, bearing upon this appeal, which appear, either affirmatively or by omission, from the record here.

In the first place, this is a suit by an *alleged* creditor of a prior owner of the property in question, to impress upon that property an alleged equitable lien, for the purpose of having such lien satisfied out of this property, unless appellee should see fit to pay such alleged claim, to prevent a sale of its property. This is not a suit involving either the title to, nor right to possession of, any of this property. So far as this suit is concerned, appellee's title to this property, and its

right to possession of all thereof, is perfect as against the world, including appellee, until and unless appellant establishes its right to a lien thereon, and appellee refuses to pay such lien, so that a sale of the property becomes necessary; except, of course, that the court may, upon a proper showing of necessity, take the possession of the property from appellee for the sole purpose of preserving the property from loss, damage or waste, which would prevent appellant from securing payment of its lien, if any, when established.

In the next place, it must be remembered that none of the defendants, other than the Alaska Mines Corporation, sole owner and in sole possession of the property in question, is a party to this appeal. Appellant, in its brief, repeatedly refers to other of the defendants in the action as "appellees," but this is incorrect. None of the other defendants is alleged to have any interest in the property appellant asks a receiver for; and neither of these other defendants has any interest in whether or not such a receiver is appointed. They were, therefore, not proper nor necessary parties to the appeal, and were not made such parties by appellant. Neither of the other defendants appeared nor made any showing in opposition to the application for a receiver in the lower court (Tr. p. 46). The citation on appeal was directed only to defendant Alaska Mines Corporation (Tr. p. 256); and



the appeal bond ran only to the Alaska Mines Corporation (Tr. p. 246). For this reason, it is not proper for this court to consider or pass upon questions which may be involved upon the trial of this action, which affect other of the defendants, but which are not necessary to be determined as to the Alaska Mines Corporation, sole appellee here, alone. Most of the questions discussed by appellant in its brief affect other of the defendants in the action, especially those against whom it prays a personal judgment (Tr. p. 17); and they have little, and, as we believe and will argue, no bearing upon the questions involved at this time.

Further, it will be noted that this action is not brought by or for the benefit of any other alleged creditor, nor any stockholder of the Nome Consolidated Dredging Co., nor is a general receiver of either defendant asked for, but only a receiver for the particular property in question, and such a receiver would be for appellant's benefit only.

So far as appears from the record here, there are no creditors of the Nome Consolidated Dredging Co. other than appellant's alleged claim; nor does the record show there were any stockholders of that company other than those secured by the two mortgages in question; nor, if there were any other such stockholders, that any of them have ever made any complaint about the mortgages or the foreclosure and transfers in ques-

tion. While appellant appears very solicitous of the rights of "the worried creditors and deluded stockholders" who "stalked the earth looking for justice" (Brief pp. 32-33), and repeatedly refers to the *other* creditors and stockholders, who it alleges were also defrauded through the deep laid scheme and conspiracy appellant pretends to find from the record here, nevertheless, no one else claiming to be a creditor of the Nome Consolidated Dredging Company, or a stockholder thereof, has "stalked" into court to obtain any redress for these alleged terrible wrongs; and appellant can claim no benefit for itself as a champion for the rights of others whom it has not shown exist. It can be presumed that no such other creditors or injured stockholders exist, or appellant would have succeeded in securing their active assistance in this suit.

Another fact must be kept in mind on this appeal, that the issues of indebtedness, fraud, preference, notice and bona fides have not yet been tried nor determined. This is not an appeal from a final judgment, with findings of fact made, or evidence offered upon which findings of fact could be made, upon these issues; nor can appellant by repeating its claim of fraud, change mere allegations, expressly denied, into findings of fact or proof thereof. But the lower court was bound to take the disputed issues of fact, determine only those bearing on the necessity for the ap-

pointment of a receiver of appellee's property before trial, and from these and the admitted facts, render its judgment upon appellant's motion for a receiver; and this court in reviewing that judgment will do likewise, without deciding any issue of fact which is disputed in the record, except only those bearing upon the necessity for a receiver before trial, no matter how strongly it might be impressed with the possible truth of any disputed allegation. This applies to the first two subdivisions of the questions of fact as made by appellant on page 19 of its brief, and to practically all of the references to the record made by appellant, in support of its contentions under these two subdivisions. The issues of fraud and notice are in sharp dispute in the pleadings in the case, and most of the references to the record which appellant makes to support its contentions as to these two issues, are either explained or denied by other portions of the record not referred to by appellant, so that the court cannot, at this time, nor on this record, pass upon these issues: but, in passing upon the order under review, this court must treat these issues as though unproven, and therefore, as untrue. We will refer to many of these matters later in our argument, and will not lengthen this brief by further reference to them at this time.

Another thing should be borne in mind, that appellant claims there are four mortgages upon the property in question. Appellee claims that three of these

mortgages have been paid. But, whether there are one or four existing mortgages, the fact is neither of these mortgagees is a party to this action, nor to this appeal, although the appointment of a receiver for the property would affect the possession of the mortgagor, and thereby the security of the mortgagees, without their having had an opportunity to defend against such action.

We have made this general statement so that the court may not lose sight of the material and vital issues upon this appeal, because of the statements in appellant's brief of what it claims are facts, but which are only statements of disputed issues of fact, nor because of its long argument of issues, disputed and not yet supported by evidence, while it almost ignores the real issues here involved.

### POINTS OF LAW AND FACT TO BE DISCUSSED.

Appellee will argue the following points of law and fact, although it will contend that only the first three and seventh points are necessary to be considered upon this appeal, to-wit:

1. The court had no authority, under the law applicable to this case, and the record herein, to appoint a receiver, pendente lite of appellee's property.



2. Even if the court had such authority, the record is insufficient to justify such appointment.

3. If the record is sufficient to justify such appointment, the lower court did not abuse its discretion in refusing to do so, as no necessity therefor is shown.

4. The mortgages in question were bona fide; but in any event, the court cannot find upon the record here that they were fraudulent.

5. The stockholders and directors of the Nome Consolidated Dredging Company had a legal right to secure themselves by these mortgages, as against appellant; but in any event, the record is insufficient to warrant a decision upon this appeal that such security was void as to appellant.

6. Appellee is a bona fide purchaser for value of the property in question, without notice of appellant's alleged claim; but in any event, the record is insufficient to warrant a contrary decision upon this appeal.

7. Appellant could have ample protection by notice of *lis pendens*.

## ARGUMENT.

### NO LEGAL AUTHORITY FOR APPOINTMENT OF RECEIVER.

Section 1585 of the Code of Civil Procedure of Alaska, 1913, provides:

"A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property—

"First. Provisionally, before judgment, on the application of either party, when his right to the property which is the subject of the action or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;

"Second. After judgment, to carry the same into effect;

"Third. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the debtor refuses to apply his property in satisfaction of the judgment;

"Fourth. In cases provided in this code, or by other statutes, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights:

"Fifth. In the cases when a debtor has been declared insolvent."

The first subdivision of this section does not cover this case, because appellant does not claim any "right to the property;" but only a lien thereon. The purpose of this provision is to preserve the property where necessary, when a party out of possession claims own-

ership and right of possession thereof as against the party in possession, who is wasting the same or its rents and profits. The second subdivision of the section, of course, has no application. The third subdivision does not cover this case at the present time, because no judgment has been entered, no appeal from a judgment taken and no execution issued, in this case. Neither is it claimed that the appellee here is "the debtor" of appellant.

The fourth subdivision has no application, because it applies only to *debtor* corporations, and, in any event, appellee has not been dissolved, nor does appellant allege that it is insolvent or in danger of insolvency, nor that it has forfeited its corporate rights. And this subdivision applies only to *receivers for corporations*, not to *receivers for property* in the possession of third parties, upon which a party claims only a lien. This is also true of the fifth subdivision of the section, which, therefore, has no application here.

Appellant, on page 53 of its brief, refers to this statute, but states that a party is entitled to a receiver when he shows that he has a probable "*right or interest in the property or fund;*" but the statute does not give him such right when he merely has *an interest* in the property, much less when he only claims an equitable lien thereon, which is neither *a right to nor interest in the property*. And even if, under this stat-

ute, a party might be entitled to a receiver, *after judgment* establishing his alleged equitable lien, this would not entitle such party to a receiver *before judgment*, where no "right to" the property was even claimed. Appellant cites no authorities in support of its contention on this question, which apply under a statute worded as this is; and we believe that the statute, not general equitable principles, controls here. It is appellee's claim, therefore, that the court had no power to grant appellant's petition for the appointment of a receiver, *pendente lite*, of appellee's property in this case, because no such power is given by the code governing such appointments.

# RECORD INSUFFICIENT TO JUSTIFY APPOINTMENT. IN ANY EVENT, NO ABUSE OF DISCRETION SHOWN

Our points 2 and 3 are so closely connected that they can best be discussed together, the same evidence and rules of law applying to both.

In our opinion, this court not only will not, but should not, consider any questions of either law or fact upon this appeal, except the question of power under the statute already mentioned, other than whether or not the record is sufficient to have justified the lower court in granting the motion for the appointment of a receiver, *pendente lite*, and, if so, whether



or not it abused its discretion in not granting such motion. If, *for any reason whatever*, the record is insufficient to justify the appointment, of course, the order appealed from must be affirmed; and, even if the record is sufficient, so that such an appointment would have been affirmed, or this court, if sitting as a court of first instance, would have made the appointment, nevertheless, under the settled rules of law, this court will not reverse the decision of the lower court on the motion, unless that court clearly abused its discretion in the matter.

Appellant appears to appreciate the force of our contention in this regard, as its argument is based almost entirely on questions of fact in sharp dispute, and is directed to questions of law related thereto, which are not necessary to a decision on this appeal, nor, in our opinion, even proper to be considered now, but which appellant apparently hopes to have this court decide before trial, so as to control the lower court in its decision upon the trial. However, we do not think this court will undertake to decide any disputed questions of fact not necessary to be decided now, from a record containing only pleadings and affidavits; nor will it now lay down any rules of law for the guidance of the trial court upon the trial of the case, when it is not necessary to do so in passing upon the questions now involved, and all parties to be affected thereby are not before this court.

We think this court, at this time, will do as the lower court did, consider only *the necessity* for a temporary receiver, as shown by the record “without expressing any opinion on the questions of fraud, conspiracy and notice thereof to defendant alleged and involved in this case.” (Tr. pp. 240-241.)

As already stated, appellant does not claim to be the owner, nor entitled to the possession, of any of the property for which it asks a receiver. Appellant alleges facts showing that appellee is the legal owner and in possession of all of such property. Appellant's only claim is that it is entitled to a lien upon this property, for the payment of its claim against a prior owner of the property. If appellant should establish this alleged lien, all it is interested in is that its claim be paid, either out of the property or by appellee, or by one or more of the other defendants in this action, who would be liable for the claim. The only reason for appointing a receiver for the property, pending a trial on the merits, would be that *none of the defendants* is able to pay the claim, if appellant should prevail at the trial; that appellant could only secure payment out of this property, and that appellee is likely to waste or destroy the property before a trial can be had on the merits, so that appellant would be unable to collect its claim, unless a receiver be appointed to preserve the property from waste or destruction pending the suit.

If appellant should prevail at the trial, and the court then held that it was entitled to payment of its claim out of this property, judgment would be entered against the defendants committing the alleged fraud, and making it a lien upon the property, thereby compelling appellee to either pay the claim or have the property sold, unless it was paid by the other defendants who would be primarily liable therefor; and the court could then, if necessary, under the express terms of the code, appoint a receiver for the property to preserve it until the claim was paid or the property sold. If appellee took an appeal from such judgment, it would be compelled to give a supersedeas bond to pay the judgment, if affirmed, or the property would be sold.

It is clear, therefore, that appellant was not entitled, in any event, to a receiver pendente lite, unless it made a clear showing that it would probably prevail at the trial against appellee, and that it would be unable to collect its claim, unless such receiver was appointed. Unless the record here shows *both* these facts so clearly that the lower court not only would have been justified in making such appointment, but abused its discretion in not doing so, the order appealed from must be affirmed, regardless of what the court may find the law or facts to be on the trial, relative to the alleged fraud, conspiracy or notice thereof, or

what it may feel from the present record, the finding on the trial on these questions may be.

The foregoing contention is amply sustained by authority.

This court has laid down the general rule under the general equitable powers of the court governing the appointment of receivers, *pendente lite*, as follows:

“To warrant the interposition of a court of equity by the aid of a receiver, it is essential that plaintiff should show, first, either a clear, legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand; and, secondly, it must appear that possession of the property was obtained by defendant through fraud, or that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. High on Receivers (2nd Ed.) Sec. 11. See also 23 Am. & Eng. Encl. of Law, 1036.”

*International Trust Co. v. Decker Bros.*, 152 Fed. 82.

It is clear that, in speaking of obtaining *possession* of the property “through fraud,” the court refers to those cases where plaintiff claims the right to such possession, which possession defendant obtained fraudulently as to plaintiff. In this case, appellant never had any right to *possession* of the property in question, and appellee’s possession thereof is valid as against the world, including appellant, and is not fraudulent, even



though it should be held upon the trial that appellee's title to the property is subject to appellant's right to a lien thereon.

In a creditor's suit, therefore, under the rule laid down in this case, the plaintiff, in order to be entitled to a receiver of the property of the defendant, must show *clearly* "that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand," and he must also show "that the property itself, or the income from it, is in danger of loss from neglect, waste, misconduct or insolvency of the defendant." It is not enough that a plaintiff in such case show one only of these conditions, he must show both, first,—that he has a right to recover, and, second,—that he will be unable to obtain payment of his claim after judgment, unless the property be preserved through a receiver, pending the suit.

In the case of *Moore v. Bank of British Columbia*, 106 Fed. 574, his Honor, Judge Morrow, sitting in the Circuit Court, refused to appoint a receiver, *pendente lite*, saying:

"The appointment of a receiver is, as a general rule, discretionary with the court, but this discretion is not arbitrary or absolute, but it is a sound judicial discretion, which takes into account all the circumstances of the case, and is exercised for the purpose of protecting the rights of all the parties to the action and in the property in controversy. 3 *Pom. Eq. Jur.* 1331. In the present case the question whether a receiver should

be appointed involves the inquiry (1) whether the property, if left in the hands of the present holder, is in any danger; and (2) whether there is a reasonable probability that the complainant will ultimately prevail in the action."

This case was cited with approval by the Circuit Court of Appeals of the 8th Circuit, where it is said:

"A court of equity is not without jurisdiction to appoint a receiver of real estate and of its proceeds in the possession of a defendant holding under a title regular on its face. But the cases in which it may exercise that power before a trial of the issues on the merits without a departure from the established principles and practice of equity jurisprudence are exceptions to the general rule, and clear proof of the following necessary facts is indispensable to bring such a case within the exceptions:

First: The fact that there is imminent danger that unless a receiver is appointed the property or its proceeds will be deteriorated in value or wasted during the pendency of the suit.

Second: The fact that the plaintiff will suffer irreparable loss from such deterioration or waste. But if the defendant is solvent and abundantly able to respond to any such loss, or if he will give a good bond so to respond, the loss can rarely be irreparable, and the general rule is that a receiver should not be appointed.

Third: The fact that on the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately prevail on the merits.

But courts of equity are extremely averse to any interference with the possession of a defendant claiming real estate under a legal title. They proceed in such case with extreme caution and rarely interfere. If it seems doubtful whether or not the plaintiff will recover at the final hearing, or

whether or not there is imminent danger that the plaintiff will suffer irreparable loss, the application for a receiver will be denied and in the hearing and in the decision of such a case all the presumptions are in favor of the defendant in possession under a legal title. A court of equity is sedulous to prevent the successful invocation of its interlocutory injunction, or its appointment of a receiver to perform the function of a successful action of ejectment, and at the same time to avoid the trial of titles indispensable to such an action." (Citing authorities.)

*Folk v. U. S.*, 233 Fed. (CCA8th) 183.

The majority of this court sustained the appointment of a receiver, *pendente lite*, in the case of *Heinze v. Mining Co.*, 126 Fed. 11, but recognized the rule that such appointment was discretionary with the lower court, saying:

"An appellate court will not reverse the order of a lower court in appointing a receiver or in directing his action, unless it appears that the discretionary power of the court has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term 'abuse of power.'"

However, his Honor, Judge Ross, dissented and cited among other cases the Moore case above referred to, saying:

"Of course, there may be, and sometimes are, cases where the proper preservation of the property requires the appointment of a receiver, who may, when the necessities of the case require it, be authorized to operate the property. But the in-

stances are rare, and that a strong showing must be made, is well established."

The following authorities are to the same effect:

"To justify the appointment of a receiver to conserve property in controversy, *pendente lite*, it should be made to appear: (1) That the applicant therefor has a probable right to or interest therein; and (2) that such property or its rents or profits are in danger of being lost or materially injured or impaired; and further, (3) that the interest of one or both parties will be promoted by such appointment and the substantial rights of neither impaired; and (4) that the order will be best for all concerned. Section 3822 Code. Courts are reluctant in interfering with the possession of property though in controversy, especially when such possession is that of the party having legal title, and will not do so through the appointment of a receiver in the absence of a showing of a probability that the applicant will be entitled to a decree on final hearing." (Citing authorities.)

If upon the entire record this is a matter of much doubt the application will be denied. (Citing authorities.)

*Thomas v. Timonds*, 159 N. W. (Ia.) 882.

"The appointment of a receiver of any kind is a very severe blow to any corporation. It impairs its credit, interferes with its management, and imposes upon the court the onerous duty of corporate management, which it is not qualified to perform, and which it should not undertake except in extreme cases."

*Shera v. Carbon Steel Co.*, 245 Fed. (D. C.) 590.

"As against a defendant in possession and enjoyment of property which is the subject mat-



ter of the litigation equity always proceeds with extreme caution in appointing a receiver."

*High on Receivers, Sec. 19.*

"The high prerogative act of taking property out of the hands of one and putting it on pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong immediately pending."

*Crawford v. Ross, 39 Ga. 44.*

"The power to appoint a receiver is a delicate one, especially when invoked upon interlocutory *ex parte* applications, and should be exercised with extreme caution, and only under circumstances requiring summary relief or when the court is satisfied that there is imminent danger of loss, lest the injury thereby caused be far greater than the injury sought to be averted. It should never be exercised in a doubtful case."

*34 Cyc. p. 21-22.*

"The court reluctantly interferes against the legal title and then only in case of fraud clearly proved and of imminent danger and when the matter in dispute depends upon the legal title a receiver will not be appointed except in a strong case shown."

*34 Cyc. 48.*

"The grounds upon which the court will exercise its jurisdiction to appoint a receiver are that there is a reasonable probability of success on the part of plaintiff and that the property involved is in danger. While plaintiff must show his title where the rights involved depend upon title, if title or the probability of success is not shown, insolvency alone will not be sufficient; on the other hand such title or probability of ultimate success will not be sufficient to disturb a possession under claim of right unless the property is in danger of

loss or destruction, or the rents and profits are in danger of loss by reason of the insolvency of the party in possession."

34 Cyc. 54-55.

"Where there is no general ground for apprehension of loss or danger of injury to the property by leaving it to remain in the occupancy of him who has the use of it, and whose solvency is not questioned, a receiver will not be appointed."

34 Cyc. 58.

110 Pac. 598.

"The exercise of the extraordinary power of a chancellor in appointing a receiver, or in granting writs of injunction or *ne exeat* is an exceedingly delicate and responsible duty to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief. It is a peremptory measure, whose effect, temporarily, at least, is to deprive a defendant in possession of his property before a final judgment or decree is reached by the court, determining the rights of the parties, and since it is a serious interference with the rights of the citizen without the verdict of a jury, and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury. The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed; the element of danger being an important consideration in the case, a remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury (citing cases). The court will not act upon a possible danger only. The danger must be great and imminent, and demanding immediate relief \* \* \* . It is the duty of the

court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties; and it ought not to interpose unless it is satisfied that the property is being mismanaged and in danger of being lost, or that it is in possession of an insolvent or unfit trustee."

*Lancaster v. Asheville St. Ry Co.*, 90 Fed. 129 (C. C. N. C.).

"The power to appoint a receiver and sequester property will be exercised with great caution, and only where it appears that without it plaintiff will sustain irreparable loss."

*Hayes v. Jasper Land Co.*, 41 So. 909, 147 Ala. 340.

"It is a well established rule that the plaintiff, the equities of whose bill have been fully met and denied, is not entitled to the appointment of a receiver, unless he overcomes the denials in such answer by further proof in support of his bill. In other words, where the equities of plaintiff's bill have been fully met and denied by a sworn answer on behalf of the defendant, the court has no discretion, and its appointment of a receiver in such case is unauthorized." (citing cases.)

*Sweeny v. Mayhew*, 56 Pac. (Idaho) 86.

"Where a bill against one who has conveyed property to certain preferred creditors does not aver that the preferred creditors are insolvent, it does not justify the appointment of a receiver."

*Lehman-Duer Co. v. Griel Bros. Co.*, 24 So. 49, 119 Ala. 262.

"Appointments of receivers to take charge of real property should never be made until the moving party shows himself clearly entitled thereto. It is not the policy of courts of equity to take charge of real estate and manage and control it through the aid of a receiver as against the party

in possession asserting title in himself, unless it is shown to be in imminent danger of great waste or irreparable injury."

*Kelly v. Steele*, 72 Pac. (Id.) 887.

In the case of *Whitley v. Bradley*, 110 Pac. 596, the Court said:

"Equitable relief by way of the appointment of a receiver will be invoked only where the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief. The appointment of a receiver is justly regarded as an extraordinary or harsh remedy, and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy except upon a satisfactory showing that such relief is necessary in order to preserve and fully protect the rights of all the parties. \* \* \* It must, of course, be made to appear that the person seeking such relief has at least a probable right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated unless a receiver be appointed *pendente lite*."

None of the authorities cited by appellant state any rule in conflict with these authorities.

We will now examine the record on this appeal to see if it is sufficient to require the appointment of a receiver, *pendente lite*, in this case, or even to justify such an appointment, or show that the trial court abused its discretion in refusing to do so.

The first thing appellant was bound to allege and



*clearly establish*, was a debt due from the former owner of the property in question, from which appellee acquired title. This being a creditor's suit, appellant was, of course, bound to allege and prove that its debt existed at the time of the alleged fraudulent execution of the mortgages, to wit, September 14th, 1914. Appellant alleged the existence of such a debt in paragraph II of its complaint in this action; it also alleged the recovery of judgment therefor in the Court of Common Pleas of Philadelphia on June 8, 1916, long after the execution of the mortgages and their foreclosure. Appellant also alleged the recovery of judgment in the court at Nome on the alleged judgment in the Philadelphia Court, and return of execution on the Nome judgment *nulla bona*, and insolvency of the alleged judgment debtor, the Nome Consolidated Dredging Co. (Tr. pp. 3-4.)

Each and all of these allegations were denied in appellee's answer (Tr. pp. 144-145). Appellant did not offer any evidence upon the hearing of the application for a receiver, to support these allegations of its complaint, except that Mr. Powell testified in his deposition, taken by appellant, that he personally appeared at the trial of a suit in the Court of Common Pleas in the City of Philadelphia, between appellant and the Nome Consolidated Dredging Co.; that he testified at the trial of said action, which was commenced in 1914;

and that the notes involved in that suit were executed by him as general manager of the Nome Consolidated Dredging Company (Tr. pp. 136, 137). He did not testify what time in 1914 this suit was commenced, nor which party commenced it, nor what questions concerning the notes were involved.

If appellant does not prove the allegations of its complaint, which are denied by appellee, relative to the existence of the alleged debt from the Nome Consolidated Dredging Co. to appellant, then it will fail to show that it is entitled to any "lien upon" the property in question, or that such property "constitutes a special fund out of which it is entitled to satisfaction" of any claim, and, therefore, it would not be entitled to recover in this action. And certainly the court cannot say from the record herein that appellant has so *clearly shown* that it had or has such a claim, that the lower court abused its discretion in refusing a receiver, *pendente lite*.

On the question of the *necessity* for a receiver, *pendente lite*, appellant made practically no showing whatever in support of its application for a temporary receiver; while on the other hand appellee not only denied all allegations of the complaint touching this question, but also offered a large amount of testimony upon the hearing to show that there was absolutely no necessity whatever for the appointment of a re-

ceiver before trial, nor the slightest danger, if appellant should prevail at the trial, that it would be unable to collect its judgment, if a receiver, *pendente lite*, was not appointed.

As before stated, this is not a suit involving either the title or right to possession of the property in question. Appellant does not claim either, but admits by its pleadings and proofs that appellee has and is entitled to both; except that appellant claims that appellee's title is subject to appellant's right to satisfy its alleged claim against a prior owner of the property out of the same, unless appellee or some of the other defendants, pay such claim to save the property from sale.

There is no question but that the property is worth many times the amount of appellant's alleged claim, and there is no serious claim that the property, over and above all other liens thereon, is not worth many times the amount of such claim. Appellant does not allege that appellee or either of the defendants it alleges committed the fraud, was or is insolvent; nor did it offer any evidence on the hearing to show that appellee or the other defendants who would be primarily liable for the claim, are not amply able to pay any judgment appellant might obtain or establish as a lien against the property, or to pay for any waste or damage appellee might commit or do to the property, pending the

suit, which would make it impossible for appellant to collect its alleged claim, if and when established. For this reason, under the well recognized rule in such cases, appellant wholly failed to show any right to have the court take the possession of appellee's property away from it, through a receiver, prior to the trial of the action.

Appellant did allege generally in its complaint that appellee, after taking possession of the property, began to use the same in conducting mining operations on the mining claims; that these claims would be worthless when the gold was mined therefrom, and that the machinery and equipment was being worn and depreciated "and in time will be rendered valueless;" also that appellee threatens to dispose of the property. (Tr. pp. 14-15.) But appellant did not allege to what extent appellee had extracted gold from the mining claims or would or could do so before this case could be tried on its merits; nor did it allege that the use appellee was making of the machinery and equipment would render it valueless, nor even materially depreciate its value, before such trial.

In support of its motion for a receiver, appellant filed the affidavit of Mr. Gilmore, one of its attorneys herein, in which the general statement was made that, unless a receiver was appointed to take possession and control of the property, the same would be dissipated,



squandered and rendered of no value (Tr. pp. 40-42); but this was a mere conclusion, and no facts to support it were stated in the affidavit.

Appellant also offered in support of its motion for a receiver the deposition of defendant E. E. Powell, in which he testified, among other things, that at the time the deposition was taken, to wit, September 5, 1917, appellee was operating two dredges on two of the mining claims involved in this action; and was using power for these dredges from the power plant involved; also that appellee was about to complete another dredge which it expected to operate very soon; that it was appellee's intention to operate all three dredges and mine as rapidly as possible; that it might not be able to operate the third dredge before the close of the mining season that fall, but that it intended to operate the other two dredges the remainder of the season, and that appellee intended to appropriate all gold taken in such mining operations. (Tr. pp. 134-135.)

This witness was not asked, and did not testify as to how much of the ground in question could be mined by these two dredges before the close of the mining season, nor whether such mining operations were in pay dirt or only doing preparatory work, nor as to how much gold had been or would likely be taken

from these claims before this case could be reached for trial in the summer of 1918.

In its brief appellant states that, "The record also shows that about the only valuable placer claim owned by the Nome Consolidated Dredging Company at the time the assets were taken was the Carnation Group, upon which the Alaska Mines Corporation is now engaged in mining and extracting the gold and appropriating it to its own use." (Brief p. 55); also that "The Court must also conclude from the record that the use of the power plant, running at its maximum capacity for a year or two, pending this litigation, will render the said power plant worthless; that the gold from the said Carnation Group placer claim will have been mined out and appropriated by the Alaska Mines Corporation under the control of the said schemers." (Brief. p. 58.)

No reference is made to the record to support these statements, and there is not only nothing in the record to sustain them, but the statements are erroneous in fact.

In rebuttal, appellant offered the affidavit of one William M. Eddy to the following effect:

That on August 22, 1917, he went to the location of one of the dredges involved in this suit, known as the Wonder Creek dredge, and found that it had been dismantled during the previous summer, many parts

taken and removed and the balance scattered and left unprotected. That thereafter he went to another dredge, known as the Flat Creek dredge, and was there informed that appellee had dismantled the Wonder Creek dredge and taken parts for use and construction of the Flat Creek dredge. That thereafter he inspected the dredge known as the Bourbon Creek dredge and also inspected the power plant and observed that appellee was operating the power plant and was using and operating the Bourbon Creek dredge and digging placer ground and extracting gold therefrom with this dredge. That he also observed that the Flat Creek dredge had been mining on one of the claims in controversy. That appellee was then actively engaged in digging and extracting gold from the two claims upon which these two dredges were being operated. That these dredges are of large capacity, readily operated, and would, in a few weeks, dredge the valuable pay ground contained in these two claims, and render them valueless. He also stated that appellee was finishing and equipping what was known as the Greenberg or Bessie dredge, and that appellee intended to operate that dredge by power from the power plant. And he further stated that if the power plant was used to furnish power for the three large dredges it would be driven to its maximum capacity and would result in great damage and deterioration thereto. (Tr. pp. 233-235.)

This was all the showing made by appellant to sustain the burden upon it on this motion, of establishing "that the property itself, or the income from it, is in danger of loss from the neglect, waste or misconduct" of appellee.

On the other hand appellee in its answer expressly denied that it had extracted any considerable part of the gold from the mining claims upon which these dredges were being operated, and it expressly denied that the use it was making of the machinery and equipment in controversy, would wear or depreciate it or render it valueless, but alleged, on the contrary, that it had spent large sums of money, far in excess of appellant's said claim, in repairing said machinery and equipment and putting the same in first class workable condition and maintaining the same in such condition and in purchasing new machinery and equipment for use in connection therewith and upon said mining claims and for the purchase of other mining claims. And appellant also expressly denied that it ever threatened or intended to sell any of the property involved in this suit, but that, on the contrary, it intended to, and had actually added thereto, and added to the value thereof, many times the amount of appellant's claim. (Tr. p. 151.)

In opposition to appellant's motion for a temporary receiver, appellee offered the affidavit of defendant E.



E. Powell, made September 4, 1917, in which he stated, among other things, that none of the property in possession of appellee was being worn or depreciated or that it would be rendered valueless for many years, but that, on the contrary, the same was and had been refitted and large additions were being made thereto at great expense, and he expressly denied that appellee had ever threatened to dispose of any of the property mentioned in the complaint herein. (Tr. p. 193.) He also denied that it was necessary to appoint a receiver, *pendente lite*, in order to preserve or protect the property mentioned in the complaint herein. (Tr. p. 194.)

Appellee also offered in opposition to said motion the affidavit of J. H. Miles, made September 4, 1917, in which he stated that he was a mining engineer by profession and a member of the American Institute of Mining Engineers. That for the past fourteen years he had made gold dredging a specialty, operating dredges in several different states. That in August, 1916, he was employed by appellee to go to Nome and make an examination of the property in controversy, and that in January, 1917, he was employed as general superintendent to take charge of the operations of appellee's property in Alaska. He stated that he arrived in Nome April 16, 1917, and immediately took charge of the property of appellee company. That this property consisted of placer mining claims, a power plant, two dredges, the hull of another dredge, certain

buildings in Nome, automobiles, miscellaneous mining machinery and equipment. Mr. Miles further stated in this affidavit that when he took charge of this property the power plant was badly out of repair and wholly unfit for operation. That since he had taken charge of the property the power plant had been completely and thoroughly overhauled and repaired and was now in good operating condition. That appellee had spent in such overhauling and repairing more than \$3,000,000. He also stated that by overhauling and repairing the power plant he had reduced the daily consumption of oil in generating electricity from 65 barrels to 26 barrels and that the power plant in its then condition was worth not less than \$40,000. (Tr. pp. 201-3.) Mr. Miles further, on oath, stated, that when he took charge of the properties in question, the Bourbon Creek dredge was badly run down and out of repair and unfit for operation and could not be economically operated. That the screen was unfit for use and that he had removed such screen and replaced it with a screen of modern type; also placed upon said dredge a new conveyor belt and replaced worn-out pieces in the winch of said dredge, and generally overhauled it at an expense of about \$24,000.00. That this dredge was, at the time he made his affidavit, in first class condition and of a value of not less than \$125,000.00 and could not be duplicated for less than that amount. (Tr. p. 203.) Mr. Miles further stated in his affidavit

that the dredge on Wonder Creek was sunk when he took charge of these properties and was a total wreck, and, outside of some of the electrical machinery, pumps and a small amount of timber, said dredge was of no value except as scrap and that all parts of such dredge had been preserved by and were then in the possession of appellee. (Tr. p. 204.) He further stated that the Flat Creek dredge had been purchased by appellee from one Ewing, and when purchased was of a value not to exceed \$40,000.00. That the hull was too small for the type of machinery to be installed and that the same had to be reconstructed and enlarged. That appellee had purchased machinery to be installed in this dredge hull and the same had been installed, and the dredge was then completed and actively operated, and that appellee in purchasing, transporting and installing machinery thereon had expended the sum of about \$100,000.00, and that since the purchase of such machinery prices thereof had advanced to such an extent that the dredge was then of a value of \$200,000, and could not be duplicated for a less amount.

Mr. Miles further stated that the fourth dredge situated on Holyoke Creek was purchased by appellee from one Greenberg, and then consisted of a hull of a value of about \$40,000.00. That appellee had purchased machinery to install in this dredge and had reconstructed the hull thereof and was then installing the machinery therein. That appellee had expended

about the sum of \$115,000.00 in the reconstruction of the hull and machinery to be installed therein, and that the dredge would be completed and ready for operation in about thirty days from that date, and that when completed the dredge would be worth not less than \$200,000 and could not be duplicated for less than that amount. (Tr. p. 205.) Mr. Miles further stated that since he took charge of the appellee's property he had established a camp on Flat Creek which cost not less than \$3,000.00. That since the affiant was made appellee's general superintendent for carrying on its operations in the Nome District, the Flat Creek dredge and the Bourbon Creek dredge were the only dredges operated by appellee; that they had been operated for only a few days and no gold had been cleaned up from either of such dredges at that time, and that no active mining had been done by appellee since Mr. Miles became its general superintendent, except the operation of these two dredges for a few days. And he further stated that the property of appellee had not been, and was not being materially impaired, but that on the contrary, the value thereof had been materially enhanced by reason of the repairs and improvements made thereon. (Tr. pp. 205-206.)

Appellee also offered in opposition to said motion, the affidavit of H.S. Thompson, its auditor and assistant treasurer (made August 15, 1917), which corroborated in every particular the affidavit of General Superin-



tendent Miles. Mr. Thompson stated that at the time this affidavit was made, which was nearly three weeks before the affidavit of Mr. Miles was made, appellee had actually paid out for machinery for dredge No. 3, known as the Flat Creek dredge, the sum of \$51,500.00, besides about \$10,000 freight thereon. That appellee had at that time actually paid for machinery for dredge No. 4, known as the Greenberg dredge, the sum of \$74,300.00, exclusive of freight charges. (Tr. pp. 208-209.) Mr. Thompson further stated that in addition to these amounts, appellee had expended up to that time in making improvements upon the property in question, the sum of \$60,000.00, but that up to that time appellee had not done any actual mining or extracted any placer gold from any placer mining claim owned by it or held under lease or option by it. (Tr. p. 210). He further stated that appellee was organized with a capital stock of \$10,000,000, of which at least 3,781,000 shares of the par value of \$1.00 each had been actually issued and that this stock was on the New York market and a large number of shares were there bought and sold daily and the stock had a market value at the last report for the month of July, 1917, of 75c per share. (Tr. pp. 210-211.)

Appellee also offered another affidavit of H. S. Thompson, made September 4, 1917, in which he stated that since the making of his prior affidavit, appellee had continued, at great expense, to finish, repair, recon-

struct and equip dredges Nos. 2 and 3, and that the same were then in actual operation, as was also the power plant, but that dredge No. 4 was not then completed. (Tr. pp. 211-212.)

None of the statements made in these affidavits and offered by appellee, was denied in any way by appellant upon the hearing of the motion for a temporary receiver; it therefore stood admitted that since the opening of the mining season in 1917 up to the time of the hearing on appellant's motion, appellee had expended in improving its machinery, power plant and property, upwards of \$245,000, nearly eight times the amount of appellant's alleged claim, but had not taken a dollar of gold out of any of the mining claims, and, because of the lateness of the season appellee would necessarily be unable to mine very much of the property involved in this suit before the close of the mining season, or before this case could be tried after the opening of the season in 1918.

From Exhibit "A" attached to the complaint herein it will be seen (Tr. pp. 27-28), that the mining claims held by appellee, upon which appellant seeks to establish a lien for the payment of its alleged claim, cover many hundreds of acres of mining ground in the Nome mining district. In the nature of things it will take years to dredge all of this ground, especially as work can be done, as the court knows, during only a

short period each summer, and there is no claim that appellee can or intends to mine these claims in any other way than by the use of these dredges. If these claims contain any gold whatever, appellee could not obtain more than a small fraction thereof before this case can be tried on the merits, and, therefore, there is not the slightest danger or possibility of the mining claims being wasted or depreciated in value to any appreciable extent before such trial can be had.

As to the personal property, the showing made by appellee is that it has taken these wrecked and almost valueless dredges and the depreciated power plant and, by the expenditure of nearly a quarter million of dollars, together with the increase in value of machinery, has made them worth at least \$568,000.00.

But appellant argues that whatever the value of the real and personal property in question, it is subject to mortgages of about \$400,000. The facts concerning these mortgages as they appear in the record are as follows:

The Nome Mining Company held a prior mortgage for \$100,000.00 upon the property covered by the Thatcher and Sloan mortgages. This mortgage was in favor of one Lawrence Darr, trustee, and Mr. Powell in his deposition taken by appellant and offered in evidence by it upon the hearing of this motion, testified that this mortgage had been paid, which was not denied.

His explanation of how this payment was made was that the preferred stockholders of the Nome Mining Company, who controlled this mortgage and had a right to cancel the same, were to take 3,500 shares of stock in the Nome Holding Company in payment of this mortgage, and that these 3,500 shares had been left with a Mr. Reed for delivery to these Nome Mining Company stockholders for that purpose. (Tr. pp. 131-132.) This \$100,000 mortgage to the Nome Mining Company, therefore, whether satisfied of record or not, is no longer a lien upon the property in question, and does not depreciate the value of this property for the purpose of satisfying appellant's claim therefrom if it should prevail in this action.

Another mortgage which appellant claims affects the value of this property as against its alleged claim, is a mortgage of \$50,000 to the Banker's Trust Company of New York, made December 31, 1907, but Mr. Powell testified that this mortgage had been paid, although he thought it still remained unsatisfied of record. (Tr. p. 131.) There was no evidence offered by appellant to dispute this statement of Mr. Powell, and the deed to appellee company was not made subject to this mortgage, showing that the parties to that deed considered the mortgage paid. (Tr. p. 174.) Another mortgage which appellant claims affects the value of this property, so far as its alleged claim is concerned, is a mortgage for \$35,000 to one Greenberg; but this



mortgage, Mr. Powell testified, covered only the property purchased by appellee from Mr. Greenberg, and that property is not involved in this suit, as it never belonged to the Nome Consolidated Dredging Company, nor could appellant possibly secure a lien thereon in this suit. Therefore, this mortgage does not in any way affect the value of the property which would be subject to any claim appellant would have. (Tr. pp. 131-132.)

The other mortgage referred to by appellant is a mortgage given by the Nome Holding Company to defendant E. E. Powell as trustee, to secure the sum of \$200,000.00. This mortgage was given as a part of the transaction when Mr. Powell turned over the property bid in by him at the execution sale under the Thatcher and Darling mortgages to the Nome Holding Company, and was intended to secure in part the claims of creditors theretofore secured by the Thatcher and Darling mortgages. (Tr. p. 116). Of course, if the Thatcher and Darling mortgages were void, then this mortgage given to secure a part of the same indebtedness would also be void and for that reason would not affect the value of the property so far as appellant's claim is concerned. On the other hand, if this mortgage is valid as against appellant's claim, then the Thatcher and Darling mortgages were valid, and the foreclosure was valid and appellant has no right to a lien upon the property in any event.

It will therefore be seen that appellee holds more than half a million dollars worth of personal property besides several hundred acres of mining property, the value of which does not appear, except that it can be judged from the fact that appellee company was organized with a capital of \$10,000,000, and has already spent more than a quarter million of dollars in repairing machinery and equipment to mine this property; and all this property, so far as appellant's claim is concerned, is free from any valid encumbrance and is being carefully preserved and improved and would be available to pay appellant's claim if it should prevail in this action.

If there was no necessity for the appointment of a receiver to hold possession of the property until the case can be tried next summer, before any further mining of consequence can be done, then certainly the court will not deprive appellee of possession of its property, whether or not appellant is likely to succeed upon the trial. What difference does it make, so far as appellant is concerned, whether appellee or a receiver holds possession of the property prior to a trial and judgment upon the merits, so long as appellant can then obtain satisfaction of whatever judgment it may obtain? But it would make a great difference to appellee if a receiver was appointed for its property before it had an opportunity to try out the issues as to fraud, the bona fides of the mortgages which are the

basis of its title to the property, the question of the bona fides of its purchase of the property, and all the other issues raised by the pleadings in this case.

To appoint a receiver for this property would destroy appellee's credit; make it impossible for it to care for and prepare its property for mining operations next season, and force it to lose all of next season's mining, as a penalty for refusing, before trial, to pay appellant's alleged claim, which it denies, and does not owe in any event, and denies the right of appellant to enforce the alleged claim against its property. Certainly there is no law which makes it obligatory upon the court to thus injure appellee, at the request of a party who would lose nothing if appellee is permitted to retain such possession.

It would seem to us in the face of this record and such a showing, which appellant did not and could not meet upon the hearing of its motion, that it was the height of presumption to ask a court to appoint a temporary receiver, to hold this class of property over a winter season in Alaska, when the property could not be used or depreciated, merely for the purpose of preserving it for the satisfaction of an alleged claim of a little over \$30,000, the existence of which was denied and the right to enforce which is strenuously contested. We believe it would have been an act of such gross abuse of discretion on the part of the trial court

to have taken the possession of this property away from appellee and placed it in the hands of a temporary receiver prior to trial, that this court would not have hesitated in reversing such an order, although it rarely interferes with the action of the trial court in these matters.

This is especially true if either or all of the mortgages above referred to are existing liens on the property, as neither of the mortgagees therein is a party to this action. The court will not interfere with the possession of the mortgagor, at the instance of a third party, where the mortgagee is not a party to the suit, as such interference would endanger the mortgagee's security, entitle him to foreclose, and in effect deprive him of possession without his having had a hearing or opportunity to protect his interest.

## THE TWO MORTGAGES FORECLOSED WERE BONA FIDE.

While we feel confident this court will not, on this appeal, consider any other questions in this case, than those already argued by us, nevertheless, as appellant has argued the other questions at such length, basing its argument upon incorrect assumptions as to what the record shows, we will discuss these questions to some extent, so that the court will see appellant has



no such clear, strong equities as it would have the court believe.

Appellant alleges and claims that the Thatcher and Sloan mortgages were without consideration, and therefore void; at least, that whatever actual indebtedness of the bank was secured by the Thatcher mortgage was paid by the mortgagor, Nome Consolidated Dredging Co., prior to the foreclosure; but this argument is wholly unsupported by the record, which, in fact, conclusively shows that each mortgage was given to secure bona fide debts of the mortgagor, no part of which had been paid when the mortgages were foreclosed. In fact, appellant's allegations and statements that the notes secured by these mortgages were "spurious," and without consideration, are contradicted by its allegations and argument that they were given to *prefer* the persons secured, over other creditors and stockholders of the mortgagor. There could be no *preference*, if there was no debt; it would be a case of *fraud* alone, not of preference.

But the record fully answers appellant's contention on this question, for it shows in detail the consideration for each note secured by these mortgages.

Appellant alleged the execution of the Thatcher mortgage for \$25,000 by defendant E. E. Powell as Vice-President and General Manager of the defendant Nome Consolidated Dredging Co. That of the 37 notes

evidencing the \$25,000 secured by this mortgage, seven purported to have been delivered to the Alaska Banking & Safe Deposit Co., of which corporation Thatcher, the trustee mortgagee, was then manager and principal officer. That sixteen of the notes, aggregating \$7,017.24, purported to be delivered to the Nome Consolidated Dredging Co., mortgagor; seven of the notes, aggregating \$3,500, purported to be delivered to defendant M. W. Newton; two of the notes, aggregating \$2,000 purported to be delivered to the defendant Louis Eisenlohr; four of the notes, aggregating \$2,000, purported to be delivered to the defendant E. L. Webster, and the other note, purported to be delivered to the defendant J. M. Sloan. And appellant alleged that in truth and in fact all of the notes were delivered to and held by the defendant E. E. Powell for certain fraudulent purposes thereafter alleged. It further alleged that the Alaska Banking & Safe Deposit Company was paid in full by the defendant Powell, as General Manager of the defendant Nome Consolidated Dredging Co., from sums due to the bank and secured by this mortgage, and that at the time of the foreclosure of this mortgage the bank had no interest whatever in the foreclosure proceedings. (Tr. pp. 5 and 6.)

Appellee, in its answer, admitted the execution of the Thatcher mortgage, and that the 37 notes secured thereby were delivered to the respective persons or

parties to whom appellant alleged they were purported to have been delivered, except that the Sloan note was delivered to one J. W. Alford. But appellee expressly denied that any of the notes were delivered to or held by the defendant Powell for any purpose or purposes alleged or referred to in the complaint; but it admitted that long after the execution and delivery of the mortgage notes and after default therein, the notes were delivered to defendant Powell, as trustee for the respective owners and holders thereof, for the sole purpose of procuring a foreclosure of the mortgage. Appellee expressly denied that the Nome Consolidated Dredging Co., acting through defendant Powell, or otherwise, ever paid the Alaska Banking & Safe Deposit Co., or any owner or holder of either of said promissory notes, any money, sum or amount whatsoever on account thereof, or of the indebtedness evidenced by the promissory notes or secured by said mortgage, either as alleged in the complaint, or otherwise; and it also expressly denied that the indebtedness to the bank, as evidenced by either or all of the notes, or secured by the mortgage, was at the time of the foreclosure of the mortgage paid in whole, or in part. But it admitted that prior to such foreclosure, the notes owned and held by the bank were sold by it for value, and were delivered to and held by the defendant Powell as trustee for the purchaser or purchasers thereof, and

that the bank had no interest in the notes at the time of the foreclosure proceedings (Tr. pp. 145, 146).

Appellant further alleged the execution of the Sloan mortgage for \$200,000 by the defendant Nome Consolidated Dredging Co., acting through the defendant E. E. Powell as its Vice-President and General Manager; and that this mortgage was executed with the intent to defraud the creditors of the mortgagor, particularly this appellant. Appellant alleged that of the 70 notes secured by this mortgage, four were pretended to be delivered to defendant Eisenlohr, 14 were pretended to be delivered to defendant Newton, and the remainder were pretended to be delivered to defendant Alaska Dredging Co., which was officered, owned and controlled by the defendant Powell. Appellant further alleged that none of these notes was ever delivered, but that they were at all times spurious and worthless, and were held and kept in the possession of defendant Powell to further his plan, scheme and conspiracy to defraud appellant (Tr. pp. 6 and 7).

Appellee in its answer admitted the execution of the Sloan mortgage, but expressly denied that this mortgage or the notes issued and secured thereby were made, executed or delivered with any intent to hinder, delay or defraud the creditors of the mortgagor or the appellant. It admitted the delivery of the four notes to defendant Eisenlohr and of the 14 notes to defendant



Newton, and of the remainder of the 70 notes to the defendant Alaska Dredging Co. And appellee expressly denied that said notes were not delivered to these parties or that the same or either of them were spurious or worthless, or that the same were kept in possession of defendant Powell for the purpose of defrauding appellant or any person, firm or corporation, or in pursuance to or in furtherance of any plan, scheme or conspiracy to defraud (Tr. pp. 146, 147).

Appellant did not offer any evidence upon the hearing of its motion for a receiver, to support its allegation that any or all of these notes were spurious, or paid prior to the foreclosure; except as it seeks to draw such inference from the depositions of defendants George D. Schofield and E. E. Powell. These depositions were given in a suit by said Schofield against said Powell, to recover for legal services as Powell's attorney. In order to prove the value of his services, Schofield testified that he had suggested and prepared a mortgage, before the execution of the two in question. He declined to answer a direct question as to whether or not the proposed mortgage was fictitious (Tr. pp. 109-110), but did say it was intended to eliminate certain stockholders "unless they did certain things" (Tr. p. 110). These "certain things" clearly appeared to be the furnishing of their proportion of needed working capital, as Schofield urged in his let-

ter of November 20, 1914 (Tr. p. 48 et seq.) written after the execution of the two mortgages.

Mr. Powell in his deposition of September 5, 1917 (Tr. pp. 115-143) testified as to some of the indebtedness secured by these two mortgages; and there is not the slightest ground for the claim that any evidence offered by appellant even tended to show the mortgages were without any or full consideration.

On the other hand, defendant Powell, in his affidavit of September 4, 1917, filed by appellee in opposition to the motion for a receiver, went into detail as to how these two mortgages came to be executed, the various debts secured by each, and what was done with each note (Tr. pp. 180-189, 194-196); and he expressly stated that each mortgage was given to secure existing bona fide debts, or money then advanced.

Appellee also offered the affidavits of Henry L. McCoy (Tr. pp. 212-213); of Mahlon H. Newton (Tr. pp. 214-215); of R. G. Cunningham (Tr. pp. 216-217); of E. L. Webster (Tr. pp. 217-218); of J. V. Sheldon (Tr. pp. 219-221); and of G. J. Lomen (Tr. pp. 222-223), all corroborating defendant Powell as to the consideration of various of these notes secured by these mortgages.

From this showing the court must find that these two mortgages were given to secure bona fide debts owing by the mortgagor. Whether or not the mort-

gages were given with the intent of having them foreclosed if the stockholders did not pay the indebtedness secured by the mortgages, and thereby securing title to the property, the mortgages were not, in any event, "spurious" or void for want of full consideration; nor would such an intent make the mortgages void. Appellant not only failed to "clearly" show upon the hearing of its motion, that the mortgages were void for this reason, but the evidence upon the hearing conclusively showed the contrary.

Appellant recognizes its failure in this respect for it does not argue this question, but bases its claim that the mortgages were void as to it, on the ground of "Fraud in preferring the officers and stockholders as against appellant and other stockholders of the insolvent corporation" (Brief p. 33), although its argument abounds in charges of actual fraud on the part of the defendant Powell and "his fellow conspirators." However, appellant does not point out any evidence even tending to show such actual fraud, but it appears to think that by repetition of its unsupported charges, it can turn suspicion and surmise into proof, and thereby raise a prejudice which will aid its legal contention that the mortgages were void as an unlawful preference.

The simple facts are that at the time of the execution of these two mortgages, the Nome Consolidated

Dredging Co. owned considerable money, and it needed more money to take care of part of this indebtedness, and especially for working capital to enable it to repair and operate its dredges. Some of this indebtedness was owing to general creditors, and most of it was owing to certain of its stockholders and directors. These stockholders and directors wanted and were entitled to security for their debts, and they were under no obligation to furnish more money for the benefit of the other stockholders. In order to secure the debts due these stockholders and directors, as well as to secure other creditors, and to secure some cash which the company needed, these two mortgages were executed and recorded. The bank, which was advancing new money at that time, was not willing to have its security included in a large mortgage, so the \$25,000, to Mr. Thatcher, as trustee, was executed and recorded, securing the bank's advance of \$10,182.79, and certain other creditors; and the \$200,000 mortgage was executed and recorded later to secure the other indebtedness (Tr. p. 143).

Whether or not appellant held notes of the Nome Consolidated Dredging Company at that time as alleged in its complaint, at any rate, according to its own allegations any indebtedness on account of these notes was then denied by the Nome Consolidated Dredging Company, and, according to the complaint, it was not until nearly two years later that judgment was ren-



dered in appellant's favor, establishing such indebtedness. This is appellant's own statement of the matter, but appellee denies all the allegations relative to this alleged indebtedness, and it confidently expects to be able to sustain such denial upon the trial.

In any event, appellant had no established debt against the Nome Consolidated Dredging Co. at that time, and, so far as appears from the record here, these mortgages secured all the indebtedness of the mortgagor, except such as it was able to pay either out of moneys on hand or that obtained at that time from the bank.

The Nome Consolidated Dredging Co. was then a going concern, having property of considerable value (Tr. pp. 49-54, 189), but it owed considerable money, mostly to certain of its own stockholders and directors, and it needed more working capital (Tr. p. 189). In these circumstances, these mortgages were given to secure certain of its indebtedness, and to secure additional funds, and, so far as this record shows, no one except appellant, either creditor or stockholder, has ever complained because of the mortgages, on the subsequent foreclosure thereof.

Later, the stockholders were notified by defendant Schofield (Tr. pp. 48-54) that the property had been mortgaged, and that it would be sold unless funds were raised to meet the indebtedness and for working

capital. This not having been done, the mortgages were foreclosed the following summer, and the property sold, as the mortgagees had a right to do; and thereafter the property, which was bid in at the foreclosure sale by Mr. Powell, as trustee for the creditors secured, was turned over to the Nome Holding Company, which took title for the equitable owners under the sale.

Appellant complains because the foreclosure decree permitted Mr. Powell, as trustee, to bid the amount of the notes held by him and secured by the mortgages. This was not only proper, but necessary to protect all parties interested; otherwise, the property might have been sacrificed to the loss of the creditors, but with no benefit to either the mortgagor or any of its stockholders or creditors, if any other creditors then existed; for Mr. Powell, as trustee holder of the notes, would have been entitled to all proceeds of the sale up to the amount of the notes. Certainly, neither appellant nor any other person has any complaint on this account. Nor was any other person prevented from bidding at the sale, except that he could not obtain the property for less than these creditors were willing to bid for it. Nor was there any other bid, nor was Mr. Lindeberg prevented from bidding if he wished to do so, which he did not, as explained by Mr. Powell in his affidavit (Tr. p. 196).

There is absolutely nothing in the record to justify

any charge of fraud in anything which took place relative to the giving or foreclosure of these mortgages, either as to appellant or any other person, stockholder or creditor; and appellant is the only one that has ever complained. Whether or not appellant is entitled to have these mortgages, and the foreclosure thereof set aside, on the ground that they were void as to it as a preference to stockholders or directors, is another question entirely. But they certainly cannot be set aside as being fraudulent, either for want of consideration or because executed pursuant to an alleged fraudulent scheme and conspiracy, under the record upon this appeal.

Appellant recognizes the correctness of this contention, and contents itself with repeating its charge of fraud and conspiracy, assuming its mere allegations and assertions to be sufficient proof, in spite of the specific denials in appellee's answer, and the affidavits it offered denying in detail all charges of fraud, and affirmatively showing the bona fides of the entire transaction; and appellant now relies upon its contention that the mortgages were void as a preference to stockholders and directors over an alleged creditor.

We, therefore, contend that the record here shows conclusively that these two mortgages were in fact and in law bona fide; but in any event that the court cannot find the contrary from the record, and there-

fore, the order appealed from cannot be reversed upon this ground.

## THE MORTGAGES NOT VOID AS A PREFERENCE.

As we have said, we do not think the Court will consider this legal question upon this appeal, because it is neither necessary nor proper to do so. If the individual defendants in this action, as stockholders and directors of the Nome Consolidated Dredging Company, had no legal right to secure their debts, as against appellant, they are personally liable to appellant in this action, to the extent of the property thereby secured by them, and appellant prays for a personal judgment against these defendants on that ground. But these individuals are not interested in this appeal, nor parties thereto, nor before this court at this time. This Court will not, therefore, adjudicate their rights or liabilities in the premises, in their absence and before trial, where only the question of necessity for the appointment of a receiver, *pendente lite*, is involved.

But we believe the law in this jurisdiction is, or will be held to be, that these stockholders and directors had a clear, legal right to secure themselves, as against appellant, under the facts appearing here.



Appellee denies appellant's alleged indebtedness. What answer the other defendants have made or may make concerning this alleged indebtedness, does not appear in the record here. But in any event, when these two mortgages were given, any indebtedness appellant claimed was in dispute, and it admits this was not settled until nearly two years later. Certainly these stockholders and directors were not bound to forego security for their own claims, until the controversy with appellant was settled; nor waive any defense the company had or claimed to such alleged indebtedness, in order to be able to secure themselves. Nor were they required to throw the company in the hands of a receiver or bankruptcy to secure protection for their claims.

If these stockholders and directors, being bona fide creditors of the Nome Consolidated Dredging Company, secured their debts, with the knowledge, consent and approval of the other stockholders, which must be presumed as none are shown to have complained or objected, and without injury to any creditor whose claim was admitted, which must also be presumed, as none have complained, and if such secured stockholders and directors afterwards acquired title to the property mortgaged, and then conveyed the same, but long afterwards appellant established a disputed claim against the Nome Consolidated Dredging Company, certainly these stockholders and creditors

cannot be held liable to appellant on the ground of having obtained an unlawful preference over appellant; much less can appellant set aside subsequent transfers of the property, and take the possession of such property from a transferee, pending suit, where no necessity for doing so is shown.

No authority cited by appellant in its brief holds that a mortgage given under such circumstances as appear in this case, is void as to a creditor whose claim is disputed, and not adjudicated until years after the execution of the mortgage. It will be remembered in this connection that appellant does not allege, nor does the record show, that appellant secured a judgment for the full amount of the claim made by it and disputed by the Nome Consolidated Dredging Company. For aught that appears, there may have been a substantial reduction of that claim, even assuming, for the purpose of the argument only, that appellant's allegations as to its indebtedness are true.

But aside from these considerations, when this question comes properly before this court, after a trial, so that all the facts and parties are before the court, we believe this court will follow the rule sustained by the weight of authority, that a corporation, like an individual, may prefer one creditor over another, even though the preferred creditor be a stockholder or director; and that the only prohibition under the trust

fund doctrine is that stockholders, *as such*, shall not be entitled to anything until creditors are paid.

7 Ruling Case Law, pp. 755-759, and cases cited, especially in Note 15, p. 758.

However, this is a "moot question" in this case at this time, before the questions of the solvency of the Nome Consolidated Dredging Company when the mortgages were made, the bona fides of the debts secured by the mortgages, the existence of appellant's alleged debt, and other questions are tried and determined and all the parties to such dispute, and to be affected by the decision of these questions, are before the court.

#### APPELLEE A BONA FIDE PURCHASER, FOR VALUE, WITHOUT NOTICE.

We do not believe the court will pass upon this question upon this appeal, but, as appellant has discussed this question at length, as one of its three questions of fact and law, we will point out the record bearing on the question, and state our position as to the law.

Appellant alleges that the formation of appellee corporation, was one of the steps in the deep laid scheme, plan and conspiracy to defraud, which it claims existed, and that the property in question was conveyed to appellee in pursuance thereof, which purchased

with full knowledge and notice of the same (Tr. pp. 12-14).

Appellee expressly denies all the allegations of fraud (Tr. p. 149), and it denied all the allegations of notice or knowledge of any fraud, scheme or plan (Tr. pp. 150-151); and it affirmatively alleged that it was a bona fide purchaser of the property, for value and without notice "of any of the alleged acts, plans, schemes, purposes or intentions," etc. (Tr. pp. 152-158).

Appellant offered no evidence upon the hearing of its motion to show that appellee had any notice or knowledge of its alleged indebtedness, or of any of the alleged fraudulent acts, except as it seeks to charge it with legal notice, because some of appellee's present directors were parties to the alleged fraud and knew that a suit was pending on an alleged but disputed indebtedness from the Nome Consolidated Dredging Company to appellant. And appellant contends that appellee was not a purchaser for value because it gave some of its stock in payment for the property.

The only evidence in the record bearing upon these questions, is contained in the deposition of defendant E. E. Powell, given September 5, 1917 (Tr. pp. 115 et seq.), and in his affidavit of September 4, 1917 (Tr. pp. 180 et seq.).

Mr. Powell stated that after he had transferred the property to the Nome Holding Company, during



the winter of 1915-1916, he went east to see what he could do with the property; that he had numerous negotiations with Mr. Gayley, among others, now President of appellee company, which finally resulted in a proposition to sell the property to a new corporation to be organized. That thereafter, appellee was organized, and later the property was transferred by the Nome Holding Company to the new company, the Alaska Mines Corporation, appellee here, in exchange for 3,701,820 shares of its stock, out of 10,000,000 shares for which it was organized. Appellee was organized on June 9, 1916, and some time later in June or July, defendants Powell, Eisenlohr and Newton, together with Mr. Gayley, Mr. Crane, Mr. Livingston and Mr. Heckscher became its trustees. Mr. Powell testified that he acted for the Nome Holding Company in the negotiations for this sale of the property (Tr. pp. 124-125). He also testified that he and Mr. Newton were witnesses at the trial in the Philadelphia court.

It nowhere appeared that either of the other directors ever heard of appellant's alleged indebtedness, or that the four directors, other than the three who were alleged to have been parties to the alleged fraud, and were secured by the mortgages which were foreclosed, ever heard of such alleged fraud, or any alleged fraudulent act affecting the title to this prop-

erty, and appellant is forced to rely on constructive instead of actual notice to appellee.

The established rule is that notice to an officer of a corporation is not notice to the corporation, unless communicated to the officer while he is acting for the corporation either generally or with reference to the transaction to which the notice relates. Notice to one before he becomes an officer of a corporation is not notice to the corporation. Notice to an officer of a corporation while he is acting for himself or adversely to the corporation, is not notice to the corporation.

These rules are firmly established and are not disputed by appellant. We cite the court to a few of the great many authorities on this question.

10 Cyc. pp. 1054, 1058, 1061-1065.

*Thompson on Corporations*, Vol. 4, secs. 5197, 5204-5209, 5214, 5220, 5221.

“Where the interests of the officers or stockholders of a corporation are adverse to it, their knowledge of facts and circumstances affecting such interest will not be imputed to the corporation.”

*O. & C. R. Co. v. Gruibissich*, 206 Fed. (C. C. A. 9th Cir.) 577.

In the case of *Brennan et al. v. Emery-Bird-Thayer Dry Goods Co.*, 99 Fed. 971, it is held:

Notice given, before the organization of a corporation, to a person who afterwards becomes a stock-

holder and an officer or an agent of the corporation is not notice to the corporation; the Court says:

“It appears that one Robinson had been in the employ of said copartnership firms as their agent, in charge of their shoe department, in a department store, and that he attended to making all the purchases of shoes for them, and that he had sustained the same relation to the corporation since its organization. The evidence also shows that not all of the persons who composed said copartnerships are directors or stockholders in the defendant corporation. I do not understand the law to be that any information or knowledge which said Robinson may have acquired in his capacity as agent for said copartnership is imputable to the defendant corporation. The foundation of the doctrine that knowledge of the agent is chargeable to the principal rests upon the proposition that such knowledge comes to him while acting within the line of his agency for the given principal; and, as it is his duty to advise his principal of facts and information pertaining to his office as agent, the law presumes that he performs his duty, and therefore, the further presumption arises that his principal obtained such information. Story, Ag. par 140; *Bank v. Lovitt*, 114 Mo. 525, 21 S. W. 825. With the dissolution of the copartnership the office of Robinson as its agent ceased. When the corporation was created this legal entity became a distinct existence. Any knowledge or notice which an agent may have received while acting for another party or association, or which any individual member of the corporation may have obtained prior to the constitution of the corporate body, most certainly would not, as a matter of law, by implication, be carried over and imputed to the corporation, simply because one or more of the members of a previously existing concern may have become officers or stockholders of the corporation, nor because such agent afterwards be-

came an agent for the corporation. Were the law otherwise, most serious and unjust consequences might be brought upon the corporate body. 'The notice must be given to the agent while the agency exists, and it must refer to business which comes within the scope of his authority.' *Anderson v. Volmer*, 83 Mo. 406. See also *National Waterworks Co. v. City of Kansas City* (C. C.) 78 Fed. 434, 435.."

In the case of *Whittle v. Vanderbilt, M. & M. Co.*, 83 Fed. Rep. 48, the syllabus reads:

"1. The Trustees of a trust for complainant's benefit conveyed the property in violation of the provisions of the unrecorded trust instrument, to a corporation organized by them for that purpose only, and which issued to them in exchange nearly all its stock. In a suit to charge the trust on the land, held, that under Civ. Code Cal., Sec. 869, 2243, relating to purchases from trustees, the stock issued for the land constituted the corporation a purchaser for value."

"2. A corporation purchased land from two persons, who held the record title, and also owned most of the corporate stock. No one representing it, except one of the grantors, knew that it was affected by an unrecorded trust instrument. Held, that as he was dealing for his own interest, and adversely to the corporation, his knowledge was not to be imputed to it, and that it was a purchaser without notice, under Civ. Code Cal., Sections 869, 2243."

The Court said:

"Whether or not the Vanderbilt Mining & Milling Co. had knowledge or notice of complainant's claims is evidently an issue of fact, and I think squarely raised by the pleadings. Did the company, then, or not, have this knowledge or



notice? There is no proof whatever that Hazard or Godbe, who were two of the company's directors, knew anything about the contract between Samuel King and Joseph P. Taggart and James K. Patton. Nor is there any proof that Annie M. Taggart, also a director, knew of the terms or existence of said contract, while her answer specifically denies any knowledge on her part of the matter. Complainant's contention, therefore, that said company had such notice, is maintainable only on the theory that the knowledge of Patton and Chambers, the other directors, is imputable to the company. Numerous authorities are cited by complainant to the effect that notice to the agent of a corporation is notice to the corporation. *Phelps v. Mining Co.*, 49 Cal. 337; *Jefferson v. Hewitt*, 103 Cal. 629, 37 Pac. 638; *Donald v. Beal*, 57 Cal. 405. While this, unquestionably, is the general rule, yet it has no application where the officer or agent of the corporation deals with the corporation, for himself, personally. In such a case he is regarded as a stranger to the corporation, so far as concerns any uncommunicated knowledge which he may have in respect to the transaction." (Citing numerous cases.)

In *Dorr v. Life Ins. Co.*, 70 Amer. State Rep. 309, it is held:

A corporation cannot be charged with the knowledge of its president, when such knowledge was obtained before he became president, or when he was acting in his own interest and behalf. The Court said:

"Even if it should be held that notice or knowledge of the transaction between Dorr and plaintiff, whereby he secured the loan upon a promise to pledge the stock shares subscribed as collateral, could be material or effectual as to de-

fendant corporation, there are two good reasons why such notice or knowledge cannot be imputed to it. 1st. When the loan was made and the money obtained Dorr was not its president, for it had not then been organized; 2nd. Had he been president at the time, he was acting in his own interest and behalf. Under such circumstances the defendant corporation could not be charged with the knowledge of its presiding officer. *Bang v. Brett*, 62 Minn. 4."

In the case of *In re Senoia Duck Mills*, 193 Fed. 711, it was held:

"Where the vice-president of the alleged bankrupt corporation was not only acting for the corporation, but also for himself, in a matter with relation to the transfer of certain machinery to it in which his interest was adverse to that of the corporation, his knowledge of the fact that the purchase price of the machinery, which he and certain others were instrumental in selling to the corporation had not been fully paid by them, was not binding on the corporation so as to deprive it from occupying a position of a bona fide purchaser for value."

In the case of *First National Bank of Sheffield v. Tompkins*, 57 Fed. 20 (C. C. A. 5th Ct.) (1893) it was held:

"Where a bank acquires title to real estate by conveyance from its president, who held the land under a deed reciting full payment of the purchase money, and it has no actual knowledge that the purchase money was not in fact paid, it is an innocent purchaser without notice, and is not chargeable with constructive notice because of the knowledge of its president."

Pardee (Circuit Judge) in delivering the opinion of the court, cites the case of *Whalan v. McCreary*, 64 Ala. 319; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33-37; *Bank v. Cunningham*, 24 Pick. 270, and a large number of English cases and text writers. The court says:

"As, when the bank bought the property, the record showed a perfect title in Woodson, with the purchase price fully paid, and as the bank had no actual notice of outstanding secret equities, and was not charged with constructive notice of any such equities because of any knowledge of Woodson, its president, of whom it acquired the property, it follows that the bank was an innocent purchaser without notice, and, as such, acquired the property divested of any vendor's lien which may have existed in favor of Tompkins as against Woodson."

Three cases are principally relied on by appellant to the point that the Alaska Mines Corporation had notice of its claim and the alleged fraud. The first is *Wilson Coal Co. v. U. S.*, 188 Fed. 545. This was a suit by the United States to annul a patent to coal lands alleged to have been obtained by fraud. The Wilson Coal Company acquired the lands from Helen Pack Wilson, who subscribed for the *entire* capital stock of the corporation except four shares necessary to qualify the other directors. Under these circumstances it was held that the corporation was in fact Helen Pack Wilson, so far as notice was concerned. Helen Pack Wilson donated back to the treasury cer-

tain shares which were afterwards sold to others, and it is of these stockholders Judge Gilbert said:

“Those who subscribed to the stock of the new corporation and paid for the same must be held to stand in no better position than the person through whose original subscription their stock was subsequently acquired.”

This case is founded on the case of *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, which establishes the doctrine that where *all* the incorporators who owned the entire capital stock of a corporation had notice of a fraud the corporation itself had notice.

The second case is *McCaskill v. United States*, 216 U. S. 504. This was a case brought by the United States to annul for fraud a patent to a homestead in Florida. The original patentee who had obtained the patent by fraud, sold it for \$425 to McCaskill and his partners who had notice of the fraud. The corporation in question was organized to carry on and continue the business of the former partnership with the same, or practically the same, owners, and it was held on the authority of *Simmons Creek Coal Co. v. Doran* that the corporation thus organized had notice of the fraud.

The third case is *Lynn Timber Company v. United States*, 236 U. S. 577; this was also a suit by the United States to cancel a patent; the corporation in question was organized by one Smith, with 1,000 shares



of the value of \$1.00 each; 998 of these shares were issued to Smith, one to his wife, and one to his attorney; Smith paid for the stock so issued with a conveyance of the lands. He did not record the conveyance until after the suit was commenced by the United States. Under these circumstances it was properly held that Smith was in reality the corporation, and that notice to Smith was notice to the corporation.

It appeared that certain parties after the organization of the corporation and the issuance of its stock, took some of the stock as security, but the court held that the corporation could derive no new rights by reason thereof. Citing *Wilson Coal Co. v. U. S.*, 188 Fed. 545.

These cases have no application to the position of the Alaska Mines Corporation in the case at bar. It might be that under these authorities it would be held that the Nome Holding Company had notice of all matters which E. E. Powell had notice of, but when the property involved in this suit was sold and transferred by the Nome Holding Co. to the Alaska Mines Corporation, E. E. Powell was acting for the Nome Holding Company, and it did not receive in payment for this property its entire capital stock, but only 3,701,820 shares out of a total capitalization of 10,000,000 shares. There were seven members on the board of directors of the Alaska Mines Corporation, and four never at any

time were in any way connected with the Nome Consolidated Dredging Co. and cannot be presumed to have notice of the appellant's claim or any other facts which were within the actual or presumptive knowledge of Powell, Eisenlohr or Newton. More than 600,000 shares of the capital stock of the Alaska Mines Corporation were afterwards issued and sold, for value, and \$250,000, and more, thus derived, has been spent in the betterment of the property a receiver for which the appellant now seeks.

We submit, therefore, that the record fails to show any notice to appellee, either of appellant's alleged claim, or of any alleged defect in the title to the property in question.

Only one authority is cited by appellant to the effect that a corporation can not be a bona fide purchaser for value when it only issued stock in payment of the property purchased. 2 Cook on Corporations, 764, is cited to this point, and the author gives as authority *Rogers v. New York, etc., L. Co.*, 23 N. E. 26. We have examined this case and can find nothing in it to support the statement of the text writer. There is ample authority to the effect that a corporation in purchasing property and issuing stock in payment therefor may be a bona fide purchaser, for value.

*Whittle v. Vanderbilt M. & M. Co.*, 83 Fed. 48.  
*Wyeth v. Rens Bowles Co.*, 68 S. W. 625 (Ky.),

digested in 5 Amer. Digest Decennial Edition, 1172.

*Thompson on Corporations*, Sec. 5207.

"We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but we do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it can not be sold, transferred or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The case of *Curran v. State of Arkansas*, 15 How. 304, 307, and *Wood v. Dummer*, 3 Mason 308, gives no countenance to anything of the kind."

*Fogg v. Blair*, 133 U. S. 534.

We believe that the court must say, under the record, and authorities we have cited, that appellee was a bona fide purchaser for value, without notice, if this question is to be passed upon on this appeal; or at least, that the record is wholly insufficient to justify a holding to the contrary at this time.

#### NOTICE OF LIS PENDENS.

Appellant says that "Alaska has no statutory right of lis pendens against personal property;" and argues that, therefore, "There is no other way of

protecting appellant's rights there except by a receiver." (Brief p. 59.)

Appellee denies that it has any intention of disposing of this property. The best evidence of this is the fact that it is organized with a large capital stock, which is bought and sold on the open market, and it has already expended more than a quarter of a million dollars repairing and improving the property and getting ready for many years of mining operations on its claims. A notice of *lis pendens* would protect appellant as to the mining claims and the power plant, which are certainly worth many times appellant's alleged claim; and, in the nature of things, these large dredges could not be sold at Nome, separate from the mining claims. Therefore, for practical purposes, a notice of *lis pendens* would give appellant ample protection, pending a trial of this case, if any is needed other than the financial responsibility of the defendants in the case, without tying up the property through a receiver.

## CONCLUSION.

We have not undertaken to point out in the record the answer, by denial or explanation, to many of appellant's insinuations of fraud contained in its brief, for the reason that we do not believe the court will consider these matters have any bearing upon this



appeal. But if the court considers it proper or necessary to examine the entire record covering all of the questions raised or argued, it will readily see that every claim of fraud, or fraudulent act or purpose, made by appellant, was fully met, and denied or explained, by appellee upon the hearing of the motion for a receiver.

For instance, Mr. Powell in his affidavit of September 4, 1917, fully explained the annual statement of the Nome Consolidated Dredging Company for 1915, Exhibit "C" attached to the complaint (Tr. p. 192).

Again, the inference of fraud appellant seeks to draw from the fact that Mr. Powell bid in the property at the foreclosure sale for only about \$27,000, is not justified, for the reason that the property was sold under execution for debts aggregating nearly \$236,000 (Tr. p. 21), and was bid in for these creditors, who received nothing for their claims but the property. By bidding a small amount, these creditors saved very heavy Marshal's fees, which was the reason for the small bid (Tr. p. 199). So the inference of fraud sought to be drawn from the fact that the name of the payee was left blank in some of the notes secured by the \$200,000 mortgage, is unwarranted, because a note in blank is payable to bearer, and Mr. Powell testified that he delivered each note to the party entitled thereto, who endorsed the same, and he simply filled in their respective names later before foreclosure.

Appellant states in its brief (p. 21) that "Powell is now the general manager of the Alaska Mines Corporation, with an annual salary of \$6,500," and again on page 32, states that he "is its general manager at an annual salary of \$6,500 per year." But on the very page of the transcript referred to be appellant, Mr. Powell testified that he *was not* and *never had been* general manager of appellee (Tr. p. 135).

There are so many such incorrect statements, and wholly unwarranted assumptions contained in appellant's brief that, to point them all out would extend this brief to an unreasonable and, we believe, unnecessary length: especially as they are all made for the purpose of making this court think that a gigantic scheme of fraud was planned and carried out, in the hope that by so doing the court will say that appellee's property should be tied up, and thereby force it to pay a claim which it does not owe, and never heard of before this suit was brought, and which it denies exists.

The court will take judicial notice of geographical and climatic conditions, and it knows that no mining operations could be carried on much after the order of the lower court appealed from was made, nor before a trial can be had of this case on the merits. By the time this appeal can be determined, in the ordinary course, and a mandate filed in Nome, the case can be tried. To reverse the order appealed from, therefore, would not

help appellant. It is clear, therefore, that the main purpose of this appeal is to try, by repeated assertions of fraud and conspiracy, to obscure the only material issue upon the appeal, and secure a ruling or some expression on other questions, which would influence the trial court upon the trial of the case on the merits. We are confident the court will not prejudge any question in this case, upon a record such as is before it; but will confine its opinion to the only questions here involved, namely, that of power to appoint a receiver, and necessity therefor; and we believe that on these questions it will be fully convinced that the order appealed from was not only justified, but the only order the court could have properly made upon the record before it.

Respectfully submitted,

W. H. BOGLE,  
F. T. MERRITT,  
LAWRENCE BOGLE,  
THOMAS R. LYONS,  
IRA D. ORTON,  
O. D. COCHRAN,  
*Attorneys for Appellees.*

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

HATTIE HARDESTY CHAPMAN,  
Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of THE  
REALTY UNION, a Corporation, Bankrupt,  
Appellee.

**Transcript of Record.**

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

FILED

MAY 6 - 1917

F. D. MURKIN, CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Referee's Certificate on Petition to Review Order on Claim of Hattie H. Chapman.

WM. M. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,

Attorneys for Hattie Hardesty Chapman, 112 Market Street, San Francisco.

[Endorsed]: Filed Oct. 5, 1917, at 11 o'clock and 30 min. A. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1\*]

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(Title of Court and Cause.)

**(Order for Adjudication, Referring Matter to Referee and Designating Newspaper.)**

At San Francisco, in said District, on the 11th day of September, 1915, before the said Court in

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

Bankruptcy, the petition of Susan L. Locke, Wallace H. Locke and Nettie Huntington Post that The Realty Union, a corporation, be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said The Realty Union, a corporation, is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to A. B. Kreft, one of the Referees in bankruptcy of this court, to take such further proceedings therein as are required by said Acts; and that the said The Realty Union shall attend before said referee on the 21st day of September, 1915, at his office in San Francisco, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in The Recorder, a newspaper published in the City and County of San Francisco, State of California, within the territorial district of this court, and in the county within which said bankrupt resides.

Dated, September 11th, 1915.

M. T. DOOLING,  
District Judge.



[Endorsed]: Filed at 11 o'clock A. M., Sep. 11, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

---

(Title of Court and Cause.)

**Petition for Order of Sale.**

To the Honorable the District Court of the United States, for the Northern District of California, and to Hon. A. B. KREFT, Referee in Bankruptcy in and for the City and County of San Francisco, State of California.

R. M. Sims, trustee of the estate of the above-named bankrupt, respectfully represents to this Honorable Court:

1.

That among the property belonging to the estate of said bankrupt, and which has come to and is now in his possession, are certain pieces of real property hereinafter designated by numbers from 1 to 37 inclusive, and 38(1), 38(2), 38(3), and 38(4). Said parcels are described in order on pages attached at the end hereof, each particular parcel being identified by the proper designation preceding the description, the word and figure "Parcel 1," preceding the description of Parcel 1, the word and figure "Parcel 2" preceding the description of Parcel 2, etc.

2.

All said lands belong to the estate of said bankrupt, subject only to the encumbrances, liens and

claims hereinafter mentioned.

\* \* \* \* \*

# 7.

That on April 12, 1912, Caro Mills conveyed by deed of trust said Parcel 30 to Charles T. Rodolph and E. H. Cramer, to secure the payment to Union Savings Bank, a corporation, of five thousand dollars (\$5,000), due April 12, 1913, [3] with interest at 6% per annum, such indebtedness being represented by promissory note. Said real property was conveyed to The Realty Union subject to said mortgage.

Said deed of trust is recorded in Liber 2021 of Deeds, page 389, records of the Recorder's Office of Alameda County.

By assignment J. F. Carlston and Arthur L. Harris are now trustees under said deed of trust.

By assignment and transfer Central National Bank of Oakland has become the owner of said note and security.

\* \* \* \* \*

# 91½.

That on July 28, 1914, Roosevelt Johnson mortgaged to the Hibernia Savings and Loan Society, Parcel 31, to secure the payment of a promissory note in the principal sum of five thousand dollars (\$5,000).

That said mortgage is recorded in Liber 1069 of Mortgages, page 396.

That on July 28, 1914, Roosevelt Johnson mortgaged to Hibernia Savings and Loan Society said

Parcels 31 and 32, to secure the payment of a promissory note in the principal sum of five thousand dollars (\$5,000), with interest at 6½% per annum.

That said mortgage is recorded in Liber 1075 of Mortgages, at page 14.

\* \* \* \* \*

24.

That on May 11, 1915, Hattie Hardesty Chapman began an action to enforce a vendor's lien on Parcel 31. Said action is still pending, the petitioner having obtained time to appear therein. It is averred in said suit that Parcel 31 and other lands were exchanged for an Investment Certificate about one [4] year prior to the commencement of the suit. Petitioner avers that said action is without merit in view of the fact that investment certificates were taken in exchange, which certificates contained many provisions other than promises to pay money.

Wm. Aydelotte, Esq., Hearst Building, San Francisco, California, is attorney for plaintiff.

25.

The extent of the overlapping of securities is set forth in this paragraph. The trust deeds hereinbefore mentioned will be referred to by the names of the beneficiaries, and the mortgages by the names of the mortgagees. The actions will be referred to by the names of the plaintiffs. Taxes for the year 1914-5 remain unpaid on all the property, and such liens are omitted.

# TRUST DEEDS.

\* \* \* \* \*

(e) The Caro Mills (now Central National Bank of Oakland) trust deed, dated April 12, 1912, (paragraph 7 hereof) for \$5,000, covers Parcel 30; and there are no other valid liens against the property.

\* \* \* \* \*

# MORTGAGES.

(h-2) The Hibernia Savings and Loan Society mortgage dated July 28, 1914 (paragraph 9½ hereof) for \$5,000, covers Parcel 31 and said property is encumbered by a second mortgage to the same mortgagee for \$5,000, as shown in the next sentence.

Parcel 31 is subject to the claims of the Chapman suit (paragraph 24 hereof).

(h-2) The Hibernia Savings and Loan Society mortgage, dated July 29, 1914, (paragraph 9½ hereof), for \$5,000, covers Parcels [5] 31 and 32, and Parcel 32 is otherwise unencumbered by valid liens.

\* \* \* \* \*

# 26.

That your petitioner is advised and believes and alleges that the value of the security hereinbefore mentioned in the case of each loan is very considerably in excess of the amount of the loan. That a sale of said property is necessary to pay the claims of creditors herein. That owing to the confusion in and overlapping of liens, a sale in this court will be for the best interest of the estate of said bankrupt.

That in the judgment of said trustee, it will be



for the best interests of the unsecured creditors of the estate of said bankrupt holding claims amounting to approximately five hundred thousand dollars (\$500,000) that said real property be sold under the direction of this Court, free and clear of liens and encumbrances, and that any and all liens and encumbrances thereon should be propounded before this Court, and that the proceeds from the sale of said property should stand as the substitute for the property so sold, and be held by said trustee for the benefit of those holding *bona fide* lien claims to the extent of their interests therein, as they may hereafter be established. That more can be obtained for said properties if sold in the estate of the bankrupt free and clear of liens, than if sold under trust deeds or in foreclosure.

That in the opinion and belief of said trustee, the whole of said property can be sold to good advantage, and for a fair and reasonable price, if sold either at private sale under sealed bids, or at public auction, and that notice of [6] said sale by one publication at least ten (10) days prior to said sale will be ample notice thereof.

\* \* \* \* \*

28.

That unless the said persons who are beneficiaries and trustees under said deeds of trust, and who are mortgagees under said mortgages, and the various persons asserting claims and liens against said properties, are restrained by this Court from proceeding with the sale of the said real property herein de-

scribed, the estate of said bankrupt will suffer great loss, and its real property will not bring a fair or adequate price, and that an injunction is necessary herein to prevent sales under said trust deeds and said mortgages, and decrees of foreclosure upon said mortgages.

WHEREFORE, said trustee prays for an order of this Court authorizing said trustee to sell the whole of the real property herein described, free and clear of liens and encumbrances or transfers in trust, either as a whole or in such parcels as the Court may determine, and upon such notice and in such manner as the Court may judge proper, and for the best interests of the creditors, and that each of the beneficiaries and trustees and mortgagees and lien claimants hereinbefore mentioned in this petition, and all persons claiming through or under them, and their successors and assigns, and all persons claiming any lien, encumbrance or trust deed upon said property, or any part thereof, be required to propound their liens and claims before this Court, and that all *bona fide* lien claimants be remitted to the proceeds of such sale; and that said parties claiming under said deeds of trust and [7] mortgages, and said judgment liens, and under other instruments or titles, and who have been hereinbefore referred to, and each of their agents and representatives and officers, and all persons acting for them or either of them, be enjoined from taking any proceedings to sell said real property, or any part thereof, pending the final determination of this petition, and pending the sale

ordered by this Court, and that such other and further order may be made as may be meet and proper in the premises.

R. M. SIMS,

Trustee and Petitioner.

R. H. CROSS,

J. A. ELSTON,

BLACK & CLARK,

Attorneys for Trustee and Petitioner.

\* \* \* \* \*

### PARCEL 30.

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

BEGINNING at a point on the eastern line of Telegraph Avenue, as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of 45th Street, formerly Linden Lane; running thence northerly along said line of Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north 84 degrees 15 minutes east one hundred and twenty-five (125) feet; thence south 12 degrees 30 minutes west [8] parallel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches to a point on said line distant one hundred (100) feet northerly from the northern line of 45th Street; and thence south

84 degrees 15 minutes west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta on file in the office of the County Recorder of Alameda County.

\* \* \* \* \*

### PARCEL 31.

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

BEGINNING at the point of intersection of the northern line of 45th Street, formerly called Linden Lane, with the eastern line of Telegraph Avenue, as said street and avenue now exist; running thence easterly along said line of 45th Street one hundred and twenty-five (125) feet; thence north 12 degrees 30 minutes east one hundred (100) feet; thence south 84 degrees 15 minutes west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; and thence southerly along said last-named line one hundred (100) feet, more or less, to the point of beginning.

Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta, on file in the office of the County Recorder of Alameda County.

\* \* \* \* \*

[Endorsed]: Filed Dec. 4, 1915, 11 A. M. A. B. Kreft, Referee. [9]



(Title of Court and Cause.)

**Order to Show Cause (on Petition for Sale of Real Property, by Trustee).**

UPON READING AND FILING the duly verified petition by R. M. Sims, trustee of the estate of the above-named bankrupt, praying for an order of sale of the real property of the estate of said bankrupt, free and clear of all liens, claims and encumbrances, and praying for an order that the persons named in said petition, be required to propound their claims of lien and other claims in and to the real property of the estate of said bankrupt in this court, and for an order enjoining sales under any of the trust deeds or mortgages or decrees mentioned in said petition, and good cause appearing therefor, it is

ORDERED, that E. G. Lohman, M. A. McAuley, E. H. Lohman, Henry Medau, Willard W. White, John H. Medau, Edward P. Highby, Mary C. Highby, C. B. Highby, M. Rinehardt, Willard W. White, Anna B. Noe, J. F. Carlston, Arthur L. Harris, Central National Bank of Oakland, J. E. Clark, Henry C. Tardey, William C. Clark, Realty Syndicate, J. E. Clark, Oakland Bank of Savings, Sophia Schmidt, Oakland Bank of Savings, Osgood Putnam, Edward W. Putnam, executors of the last will of Joseph Worcester, Helen Leonie Mignon, executrix of the last will of Abel Mignon, Joseph W. Phelps, George W. Roy and Aurelia F. Roy, trustees for Roland F. Roy, Addie T. Pinkham,

and Hattie Hardeste Chapman, be, and they hereby are, ordered, directed and required to be and appear before this Court, at the office of the Hon. A. B. Kreft, Referee in Bankruptcy, in the United States Postoffice Building, San Francisco, California, on the 10th day of December, 1915, at the hour of two o'clock P. M. of said day, then and there to show cause, if any they have, why said petition should not be granted; and then and there to propound their said claims of lien before this court; and then and there to show cause, if any they have, why all *bona fide* lien [10] claimants and others claiming title, as mentioned in said petition, should not be remitted to the proceeds of the sale of said property, in accordance with their interests therein.

IT IS FURTHER ORDERED, that in the meantime, and at the hearing on said order to show cause, said parties and all persons acting under them and for them, be restrained from making any sale of said real property, or any part thereof, and the said parties be, and they are hereby, required to show cause why, in the event said sale as prayed for in said petition is ordered, they and each of them, and all persons acting for them, or at their direction, should not be restrained, pending the making of said sale, and until the same is consummated.

IT IS FURTHER ORDERED, that service of the order to show cause may be made upon the attorneys for said parties as follows:

Upon William A. Powell, Esq., attorney for the parties mentioned in paragraph 3 of said petition.

Upon Messrs. Gehring & Wyman, attorneys for the parties interested in the trust deed mentioned in paragraph 4 of the petition.

Upon Messrs. Metcalfe & Black, attorneys for the parties mentioned in paragraph 7 of the petition.

Upon Henry G. Tardey, attorney for the parties mentioned in paragraph 8 of the petition.

Upon Messrs. Tobin & Tobin, attorneys for the Hibernia Savings and Loan Society, mentioned in paragraph 9½ of the petition.

Upon Messrs. Snook & Church, attorneys for the parties mentioned in paragraph 10 of the petition.

Upon Messrs. McKee & Tasheira, attorneys for the parties named in paragraph 11 of the petition.

Upon Sydney M. Van Wyck, attorney for the parties mentioned [11] in paragraph 12 of the petition.

Upon S. C. Wright, attorney for the parties mentioned in paragraph 13 of the petition.

Upon Frank B. Lorigan, attorney for Helen Leonie Mignon, executrix of Abel Mignon, deceased, mentioned in said petition.

Upon George F. Snyder, attorney for Joseph W. Phelps, mentioned in said petition.

Upon Louis H. Ward, attorney for Addie T. Pinkham, mentioned in said petition.

Upon S. C. Wright, attorney for George W. Roy and Aurelia F. Roy, trustees for Roland F. Roy, mentioned in said petition.

Upon Wm. Aydelotte, attorney for Hattie Hardeste Chapman, mentioned in said petition.

Service shall be made at least 3 days before the hearing.

IT IS FURTHER ORDERED, that in the making of the service of this order, a copy of the said petition shall be attached thereto, and same served on or before Dec. 7, 1915.

ARMAND B. KREFT,  
Referee in Bankruptcy.

Dated December 4th, 1915.

[Endorsed]: Filed Dec. 4, 1915, 11:15 A. M. A. B. Kreft, Referee.

[Endorsed]: No. 9510. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In the Matter of the Realty Union, a Corporation, Bankrupt. Papers Transmitted with Referee's Certificate on Petition to Review Order Disallowing Claim of Hattie Hardesty Chapman. Filed at 3 o'clock P. M. Jun. 27, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [12]

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(Title of Court and Cause.)

**Answer of Hattie Hardesty Chapman to Petition of  
R. M. Sims, Trustee, for Order of Sale and Order  
to Show Cause Issued Thereon.**

Comes now Hattie Hardesty Chapman and for answer to the petition of R. M. Sims, trustee, for order of sale and the order to show cause issued thereon, and alleges as follows, to wit:



## I.

That said Hattie Hardesty Chapman, hereinafter referred to as claimant, was, by order of the referee in said matter and by consent of counsel for said trustee, granted to and including the 15th day of December, 1915, at one o'clock P. M. to answer said petition for order of sale and said order to show cause.

## II.

That said claimant has no information or belief relative to the alleged facts set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 (except subdivision E and except subdivisions H-1 and H-2 thereof) and 27 of said petition.

## III.

Answering paragraph 7 thereof of said petition, claimant avers that early in the year 1912 she was approached by representatives of The Realty Union, said bankrupt, with a view to inducing her to convey to said Realty Union, the following-described property, to wit:

“All that certain property situate on the north-east corner of Telegraph Avenue and 45th Street, sometimes called Linden Lane, in the City of Oakland, County of Alameda, State of California, having a frontage of about 253.66 feet on Telegraph Avenue by 125 feet on 45th Street, sometimes called Linden Lane. Said property being a portion of Plot Numbered Thirty-five (35) as laid down and

so designated on Kellersberger's Map of V. & D. Peralta Ranchos on file in the office of the County Recorder of said Alameda County."

That as a result of said business she conveyed to [13] said Realty Union said real estate and received therefor the sum of \$729.36, together with the two promissory notes, or certificates, hereinafter referred to; that as a part of said transaction said claimant was requested to convey a portion of said above-described real estate being parcel No. 30 referred to in said petition, to Caro Mills, and a portion of said real estate described in said petition as parcel No. 31 to Roosevelt Johnson for said Realty Union, said Bankrupt.

#### IV.

That on, to wit, the 11th day of May, 1915, said claimant filed her certain action in the Superior Court of the State of California, in and for the County of Alameda, praying among other things that it be declared and adjudged by said named Superior Court that claimant has a lien as vendor upon said hereinbefore described real estate for the payment of said purchase money and for such other relief as may be agreeable to equity, a copy of which said complaint is attached hereto and is hereby referred to and made a part hereof, together with the promissory notes or certificates attached to said complaint and marked Exhibit 1; that at the time of filing said complaint said claimant caused to be filed a notice of *lis pendens* and the same was recorded on said 11th day of May, 1915, at 4:30 o'clock

P. M. of said day in the office of the County Recorder of said County of Alameda; that a copy of said notice of *lis pendens* is attached hereto and is hereby referred to and made a part hereof and marked Exhibit 2.

V.

Answering paragraph 24 of said petition claimant denies that it is averred in said complaint filed by her in said Superior Court that parcel 31 and other lands were exchanged for an investment certificate about one year prior to the commencement of the suit, but in that regard alleges that the facts are fully set forth in said complaint, a copy of which, together with the [14] promissory notes thereto attached, and the *lis pendens* notice are hereto attached and heretofore referred to. Claimant denies that said action is without merit in view of the fact that investment certificates were taken in exchange which certificates contained many provisions other than promises to pay money or in view of or by reason of any other facts alleged or not alleged in said petition, and in this regard claimant alleges that her action is well founded in point of fact and law and equity and that she has a valid and subsisting vendor's lien on said parcels 30 and 31 in said petition described, which is the same identical property as described in her complaint and in said *lis pendens* notice.

VI.

Answering subdivision E of paragraph 25 of said petition claimant avers that it is not true that there are no other valid liens against said property therein

described as parcel 30 but this claimant alleges the fact to be that she has a good and valid vendor's lien covering said parcel 30; that said parcels 30 and 31 are subject to the claims of claimant.

## VII.

Answering subdivisions H-1 and H-2 of paragraph 25, claimant avers that if said Hibernia Savings and Loan Society has brought suit to foreclose said mortgage in said paragraph H-1 referred to that no service has been made upon her of said foreclosure papers, and that if she has been made a party to said suit she is not aware of the fact.

## VIII.

Answering paragraph 26, claimant alleges that she has no information or belief relative to the values of the properties in said petition described except in reference to parcels 30 and 31; that in this regard said claimant alleges that said property was bought from her upon the following basis, to wit: [15]

Parcel 30, on the basis of \$125.00 per running foot on Telegraph Avenue, being 153 feet or approximately \$19,125.00; and parcel 31, on the basis of \$160.00 per running foot on Telegraph Avenue being 100 feet or a total of \$16,000.00, making a total of about \$35,125.00 and that after the payment of the encumbrances then existing against said property she received as aforesaid the sum of \$729.36 in cash and the two promissory notes aggregating \$19,000.00; that claimant is informed and believes that it will be for the best interests of the estate of said bankrupt that said property be sold subject to her lien, and that the estate of said bankrupt would have



the full year of redemption within which to redeem said property should there be any excess in value over and above the payment of the mortgages now on said property together with the amount due her on her said lien; that in the opinion and belief of said claimant said property cannot now be sold to good advantage nor for a fair or a reasonable price if sold either at private sale under sealed bids or at public auction for the reason that there now exists a general depression in the value of said real estate.

IX.

Said claimant denies that unless the various persons asserting claims and liens against said property are restrained by said Court from proceeding with the sale of said real property herein described the estate of said bankrupt will suffer great loss or any loss or that its real property will not bring a fair or adequate price or that it is necessary for any reason for an injunction to issue herein to prevent sales under said liens.

WHEREFORE said claimant prays that said petition and said order to show cause issued thereunder be as to her dismissed and that she may have such other and further relief as may be meet and proper in the premises.

WM. M. AYDELOTTE,  
Attorney for Said Claimant, Hattie Hardesty Chapman.

(Duly verified.) [16]

**Exhibit 1 to Answer—Complaint, Chapman v.  
Realty Union, in Superior Court.**

**EXHIBIT 1.**

*In the Superior Court of the State of California, in  
and for the County of Alameda.*

#45,939—Dept. 2.

**HATTIE HARDESTY CHAPMAN,**  
Plaintiff,

vs.

**THE REALTY UNION, a Corporation,**  
Defendant.

**COMPLAINT.**

Plaintiff complains and alleges:

**I.**

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

**II.**

That on, to wit, the 6th day of June, 1912, plaintiff was the owner of the property situate on the northeast corner of Telegraph Avenue and 45th Street, sometimes called Linden Lane, in the City of Oakland, County of Alameda, State of California, having a frontage of about 253.66 feet on Telegraph Avenue by 125 feet on 45th Street, sometimes called Linden Lane. That said property was, and is, unimproved.

## III.

That on, to wit, said 6th day of June, 1912, said plaintiff sold and conveyed to said defendant said above-described real estate for which said defendant agreed to pay plaintiff the sum of \$19,729.36, and in evidence thereof paid plaintiff the sum of \$729.36 and gave to plaintiff its promissory notes, one for \$10,000.00 and one for \$9,000.00, copies of which said promissory notes are hereto annexed and made a part hereof marked Exhibits [17] "A" and "B," respectively.

## IV.

That said defendant has paid the interest on said above-described promissory notes to and including the 6th day of March, 1915; that no other payments on said indebtedness have been made by said defendant to said plaintiff in any amount, or in any manner, or otherwise, or at all, and that said sum of \$19,000.00, together with interest from the 6th day of March, 1915, is unpaid, and by reason of the facts herein alleged said plaintiff elects to declare the whole of said sum of \$19,000.00, together with said interest to be due and payable.

## V.

That plaintiff is informed and believes and therefore alleges that said defendant is insolvent and unable to meet its obligations; that the assets of said defendant consist wholly of unimproved real estate in the cities of Oakland and Berkeley in said county and State; that the business of defendant is being conducted at a great and continual loss and its affairs are in such a condition that its assets are

being dissipated, and that the mangement of the business affairs and prudential concerns of said defendant is grossly wasteful, inefficient and expensive.

#### VI.

That plaintiff has a lien as vendor upon said premises for the payment of said purchase money and of the whole thereof including interest which she claims in this action.

#### VII.

That plaintiff is informed and believes and therefore alleges that defendant has threatened and intends to sell and dispose of the herein described property and to apply the proceeds of any sale thereof to the liquidation of other obligations of said defendant to the exclusion and nonpayment of the purchase money indebtedness, as evidenced by said promissory notes herein described, to plaintiff. [18]

#### VIII.

That plaintiff is informed and believes and therefore alleges that defendant is indebted to divers, persons, firms and corporations in a large amount of money, to wit, over \$1,000,000.00, and that unless and without the equitable intervention of this Honorable Court and a granting of the relief herein prayed for, said plaintiff will suffer great and irreparable loss and damage.

#### IX.

That plaintiff has no adequate remedy at law and is remediless save through the equitable intervention of this Court.



## X.

That it is necessary and desirable for the proper protection of plaintiff and her rights in the premises that a receiver be appointed to take charge of and administer the above-described property, or in event it is deemed necessary by said Honorable Court, the whole of the assets of said defendant to prevent plaintiff from suffering any loss and to fully protect her rights in the premises.

WHEREFORE, plaintiff demands judgment against defendant as follows:

1. That plaintiff do have and recover against defendant judgment in the sum of \$19,000.00, together with interest thereon from the 6th day of March, 1915, to the date of the entry of decree herein at the rate of six per cent per annum.

2. That during the pendency of this action if it appear necessary to the Court so to do, that, on application of said plaintiff a receiver may be appointed by said Court to take and keep possession of said herein-described premises and to do such other acts respecting said property as may be authorized by said Court.

3. That it be declared and adjudged by said Court that plaintiff has a lien as vendor upon said premises for the payment of said purchase money. [19]

4. That in case said defendant shall not pay said judgment and/or discharge said lien that said premises may be sold and so much of the proceeds as may be necessary be applied to the payment of the judgment so rendered.

5. That said plaintiff have such other, further

and additional relief and judgment as may be desired by her and as may be agreeable to equity.

6. That said plaintiff recover of and from said defendant her costs and disbursements herein laid out and expended.

HATTIE HARDESTY CHAPMAN,  
Plaintiff.

WM. M. AYDELOTTE,  
Attorney for Plaintiff.

State of California,  
County of Alameda,—ss.

Hattie Hardesty Chapman, the above-named plaintiff, being duly sworn, says as follows: That she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are herein stated on information and belief, and as to those matters she believes it to be true.

HATTIE HARDESTY CHAPMAN.

Subscribed and sworn to before me this 10th day of May, 1915.

[Seal] HENRY SCHNEIDER,  
Notary Public in and for the County of Alameda,  
State of California. [20]

## EXHIBIT "A."

E.

No. 10219

\$10000

Investment Certificate

Issued by

THE REALTY UNION.

Incorporated 1910, Under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN OF ALAMEDA, CALIFORNIA, TEN THOUSAND DOLLARS with interest at the rate of six per cent per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent per annum, the rate of interest paid hereon for the same periods shall be increased to equal the rate of said dividends.

6%

GOLD.

6%

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid-up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President or Vice-President and by its Secretary and countersigned by its Auditor at its office in the City and

County of San Francisco, State of California, this  
Sixth day of June, 1912.

ROOSEVELT JOHNSON,  
Vice-President.

(Corporate Seal)      JESSE B. FULLER,  
Secretary.

Countersigned by

G. W. FANNING,  
Auditor.

UNITED STATES OF AMERICA. [21]

EXHIBIT "B."

E.

No. 10220

\$9000

Investment Certificate

Issued by

THE REALTY UNION.

Incorporated 1910, Under the Laws of California.

Ten years after date, THE REALTY UNION  
promises to pay to HATTIE HARDESTY CHAP-  
MAN OF ALAMEDA, CALIFORNIA, NINE  
THOUSAND DOLLARS with interest at the rate of  
six per cent per annum, payable monthly, and when-  
ever dividends paid its Capital Stockholders exceed  
six per cent per annum, the rate of interest paid  
hereon for the same periods shall be increased to  
equal the rate of said dividends.

6%

GOLD.

6%

This Certificate is transferable only upon endorse-  
ment and surrender. Any owner of Investment Cer-  
tificates of a paid-up value of not less than \$100.00



may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President or Vice-President and by its Secretary and countersigned by its Auditor at its office in the City and County of San Francisco, State of California, this Sixth day of June, 1912.

ROOSEVELT JOHNSON,

Vice-President.

(Corporate Seal)

JESSE B. FULLER,

Secretary.

Countersigned by

G. W. FANNING,

Auditor.

UNITED STATES OF AMERICA. [22]

**Exhibit 2 to Answer—Notice of Lis Pendens,  
Chapman v. The Realty Union in Superior  
Court.**

EXHIBIT 2.

*In the Superior Court of the State of California, in  
and for the County of Alameda.*

HATTIE HARDESTY CHAPMAN,

Plaintiff,

vs.

THE REALTY UNION, a Corporation,

Defendant.

NOTICE OF LIS PENDENS.

Notice is hereby given that an action has been commenced in the Superior Court of the State of

California, in and for the County of Alameda, by the above-named plaintiff against the above-named defendant to obtain, among other things, a judgment that plaintiff has a lien as vendor upon the premises hereinafter described for the payment of purchase money which she claims in said action, and for other relief; and that the premises affected by this suit are situate in the City of Oakland, County of Alameda, State of California, and are bounded and described as follows, to wit:

All that certain property situate on the northeast corner of Telegraph Avenue and 45th Street, sometimes called Linden Lane, in the City of Oakland, County of Alameda, State of California, having a frontage of about 253.66 feet on Telegraph Avenue by 125 feet on 45th Street, sometimes called Linden Lane. Said property being a portion of Plot Numbered Thirty-five (35) as laid down and so designated on Kellersberger's Map of V. & D. Peralta Ranchos on file in the office of the County Recorder of said Alameda County.

WM. M. AYDELOTTE,  
Attorney for Plaintiff.

Dated May 10th, 1915.

Recorded May 11th, 1915, at 4:30 P. M.

Received a copy of the within answer this 15th day of December, 1915.

R. H. CROSS,  
Attorney for said Trustee.

[Endorsed]: Filed Dec. 15, 1915, 2 P. M. A. B. Kreft, Referee. [23]

(Title of Court and Cause.)

**Stipulation Re Filing of Answer.**

IT IS STIPULATED that the answer hereto attached may be filed by the defendant trustee in the above-entitled matter, reserving all objections and rights, and objections to materiality of the matters pleaded in said amended answer.

Dated, August 21, 1916.

WM. M. AYDELOTTE,

Attorney for Hattie Hardesty Chapman. [24]

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(Title of Court and Cause.)

**Answer of R. M. Sims, Trustee of the Estate of The Realty Union, a Corporation, Bankrupt.**

COMES NOW R. M. SIMS, trustee of the estate of The Realty Union, a corporation, bankrupt, and as defendant answering the complaint on file herein of Hattie Hardesty Chapman, admits, alleges and denies, as follows:

1. The petition to have the said The Realty Union, a corporation, adjudicated a bankrupt, was duly filed in this court, August 9, 1915; that after due proceedings had upon the said petition this Court duly gave and made its order on the 11th day of September, 1915, adjudicating the said The Realty Union, a corporation, bankrupt, and that thereafter upon the proceedings had for the said purpose, this Court duly gave and made its order on October 15, 1915, appointing this defendant, R. M. Sims, trus-

tee of said The Realty Union, a corporation, bankrupt; whereupon this defendant forthwith duly qualified as such trustee, and that since said last-named date he has been and now is the duly appointed, qualified and acting trustee of said The Realty Union, a corporation, bankrupt. That as such trustee, he is vested with all of the rights and properties of said The Realty Union, a corporation, and that he duly succeeded to all of the property referred to in the plaintiff's complaint. That said complaint has been presented to this Court, and is on file herein, and the plaintiff is hereby answering said complaint, in accordance with the understanding of the parties, in order that the validity of plaintiff's claims may be determined.

2. Defendant admits the allegations of paragraphs I and II. Defendant admits that on June 6, 1912, the plaintiff transferred to The Realty Union, a corporation, the real property herein involved, and particularly described in paragraph II of the complaint, but the defendant denies that the said The Realty [25] Union, a corporation, agreed to pay plaintiff for said property the sum of nineteen thousand seven hundred twenty-nine and 36/100 dollars (\$19,729.36). The defendant alleges there was no agreement between said plaintiff and said The Realty Union, a corporation, whereby the said corporation promised to pay the said plaintiff said sum in cash, or to pay said or any sum in promissory notes in the principal sums of ten thousand dollars (\$10,000) and nine thousand dollars (\$9,000),



or in any other principal sum or sums, and the defendant denies that Exhibits "A" and "B" of the complaint constitute promissory notes; that it is true that at the time mentioned in the complaint the plaintiff agreed to transfer and did transfer the real property referred to in the complaint to the said corporation. That the consideration for such transfer was in part at least the two investment certificates, copies of which are attached to the complaint; that in part consideration for said real property so transferred to said corporation, said investment certificates were duly executed, issued, delivered to and received by the said plaintiff and that ever since the date of the execution, issuance, delivery and receipt thereof the same have been held by the said Hattie Hardesty Chapman, and that she has never surrendered or offered to surrender the same. That in said certificates it was stipulated that interest would be paid by said corporation on the principal sums therein referred to, at the rate of six per cent (6%) per annum, and that whenever the dividends paid upon the capital stock of the said corporation exceeded six per cent (6%) per annum, the rate of interest to be paid upon the principal sum mentioned in said certificate should for the same period be increased to equal the rate of the dividends.

That it was further provided in said investment certificate that the owner thereof might exchange the same for unimproved realty held for sale by said corporation, providing said certificate had a paid-up value of not less than \$100; that from the time said

certificates [26] were so issued and received, the same had and each of them had a paid-up value of more than \$100.

That at the time of and for a long period following the issuance and receipt of said certificates, said corporation held for sale large quantities of unimproved land of great value, and that during any of the times said unimproved lands were so held, the owner of the said certificates could, at his option, and in accordance with the terms thereof, have exchanged the same for portions of said lands equal in value to the face of said certificates; that said The Realty Union, a corporation, was, at the times when said certificates were issued, dealing in land for the purpose of profit to its shareholders and the holders of investment certificates which had been issued to many persons, and which said certificates were of the same character and conditions as the certificates issued to said plaintiff, Hattie Hardesty Chapman; that said corporation, in addition to the certificates so issued to said plaintiff, had regularly issued and there was outstanding and owned by other persons at the time of and for a long period following the time of the issuance of said certificates, other certificates in the same form and containing the same provisions for the participation of the certificate holder in the profits of the said corporation, and for the exchange of the certificate for real property belonging to said corporation; that the assets of said corporation, at the times said certificates were issued, consisted of large quantities of un-

improved land and *and* some improved land, purchased for the purpose of holding the same for a rise in values, and for a profit for the benefit of certificate holders who had received their certificates under the same circumstances and conditions as was received the said certificates so issued to the said plaintiff. That in case said lands were unimproved, they could be exchanged for certificates at the option of the certificate holders. That the lands aforesaid were of the value of two hundred thousand [27] dollars (\$200,000) and upwards, and that the persons, including the plaintiff, who accepted said certificates issued by said corporation, accepted them with the full understanding that all liens of every nature and kind upon real property transferred in exchange for such certificates were absolutely waived; that the said plaintiff fully understood in accepting the certificates attached to the complaint that she waived any and all lien in the nature of a vendor's lien, if any such lien she ever had; that the said plaintiff in transferring said lands to said corporation, and in receiving the said investment certificates, fully understood, and it was impliedly agreed in and as a part of the transaction, that she was accepting said investment certificates for said lands, and that such investment certificates, and whatsoever liens she received upon the transfer of said lands, were a complete, entire and full satisfaction and extinguishment of any and all obligation from said corporation to the said plaintiff; that it was impliedly agreed in said transaction that all

claim of every nature and kind which the said plaintiff had against said land was waived and forever transferred to said corporation. That said transfer was not a transfer upon credit, but that such transfer was made for said investment certificates, and that the privileges and considerations contained in said investment certificates, in addition to the promises therein contained to pay stated sums of money, were of great value to the said plaintiff, or to any person who might own said investment certificates, and that said transaction did not constitute a transfer for a mere promise to pay, as set forth in the plaintiff's complaint.

That it is further provided in said certificates that the principal sums agreed to be paid will be paid ten years after date, and that it was fully understood and agreed in and as a part of the said transaction, that the principal sums agreed to be paid in said certificates would be payable ten years after date. That there are no sums due, owing or unpaid to the plaintiff on account [28] of said investment certificates other than the interest agreed to be paid therein, and which may be unpaid.

3. Defendant denies that the plaintiff has a lien as a vendor upon said premises described in the complaint for the payment of the sums mentioned in the complaint, or any thereof. Defendant denies that there was any threat to sell the real property described in the complaint.

4. Defendant is unable to specify the exact amount of indebtedness owing by said corporation, but admits that the amount of said indebtedness is



large, as is shown by the records and files in this cause.

5. Defendant denies that plaintiff has no adequate remedy at law. Defendant alleges that the only remedy which the plaintiff does have is the right to present her claim herein.

WHEREFORE, plaintiff prays that defendant take nothing, or such other order as may be proper.

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Attorneys for Defendant.

(Duly verified.)

[Endorsed]: Filed Mch. 22, 1916, 10 A. M. A. B. Kreft, Referee. [29]

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(Title of Court and Cause.)

**Amendment to Answer (of R. M. Sims, Trustee).**

COMES NOW R. M. SIMS, trustee of the estate of The Realty Union, a corporation, bankrupt, and by leave of the Court first had and obtained, amends his answer herein, and by way of amendment thereto alleges:

1. That on February 23, 1912, and prior to any negotiations between Hattie Hardesty Chapman and said corporation, The Realty Union, the real property mentioned in the complaint was owned as follows:

That the parcel commencing at the northeastern corner of Telegraph Avenue and 45th Street; thence northerly along Telegraph Avenue 200 feet; easterly parallel with 45th Street 100 feet; thence northerly parallel with Telegraph Avenue 53 feet 8 inches more

or less to the northern line of land of Alden to Wallace, easterly parallel with 45th Street 25 feet; thence southerly, parallel with Telegraph Avenue 253 feet 8 inches more or less to 45th Street; and thence westerly thereon 125 feet to commencement, was on February 23, 1912, vested in Hattie Hardesty Chapman, a single woman, of the City of Alameda, California.

The parcel commencing on the eastern line of Telegraph Avenue, 200 feet northerly from 45th Street; thence northerly along Telegraph Avenue 53 feet 8 inches more or less to the north *line land* of Alden to Wallace by easterly 100 feet, parallel with 45th Street, vested in William Carlton Wallace, of the City of Oakland, California, and the remainder thereof was on February 23, 1912, vested in Margaret Annie Wallace (*a feme sole*), of the City of Oakland, California.

2. That the whole of said premises are on said February 23, 1912, subject to encumbrances as follows:

(a) Mortgage: William Carlton Wallace, a single man, [30] to Farmers & Merchants' Savings Bank of Oakland, California, a corporation, dated December 1, 1905, and recorded December 4th, 1905, in Liber 732 of Mortgages, page 348, made to secure the payment of sixty-five hundred dollars (\$6500) in three years after date, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, excepting that said mortgage did not at said time cover the northerly portion of said tract fronting 153.8 on Telegraph Avenue, and extending easterly 125 feet, and of a uniform depth.

(b) Mortgage: William Carlton Wallace (single man) to E. J. Dinkelspiel, dated September 28, 1906, and recorded September 29, 1906, in Liber 770 of Mortgages, page 113, made to secure the payment of one thousand dollars (\$1,000), one year after date, with interest according to the terms of a certain promissory note of even date therewith, and also as security for further advances, excepting that said mortgage at said time covered only part of the entire tract which the mortgage mentioned in the preceding subdivision (a) covered at said time.

(c) Deed of Trust: William Carlton Wallace, a single man, to Wm. M. Gardiner, and A. K. Munson, dated July 1, 1909, and recorded July 2, 1909, in Liber 1612 of Deeds, page 168, records of Alameda County, California, made to secure the payment of six thousand dollars (\$6,000), unto Serena N. Gardiner, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covering that part of entire tract as follows: Lot on east line of Telegraph Avenue 100 feet northerly from 45th St.; northerly along Telegraph Avenue 153 feet 8 inches by 125 feet easterly.

(d) Mortgage: William Carlton Wallace, a single man, to Leander R. Webster, dated September 3, 1909, and recorded October 16, 1909, in Liber 904 of Mortgages, page 169, made to secure [31] the payment of one thousand dollars (\$1,000) on September 23, 1910, with interest, according to the terms of a certain promissory note of even date therewith,

and also as security for further advances. Covered lot on east line of Telegraph Avenue 100 feet northerly from 45th Street; thence easterly 125 feet by 153 feet 8 inches northerly.

(e) Writ of Attachment: Issued out of the Superior Court of the County of Alameda, State of California, wherein Ransom-Crummey Company, a corporation, is plaintiff, and William C. Wallace is defendant, recorded November 1, 1910, in Liber 28 of Attachments, page 329, to recover the sum of \$325.00 besides costs, etc. Levy made on said date by sheriff of Alameda County on all the right, title, claim and interest of defendant, of, in and to lot at the northeastern corner of Telegraph Avenue and 45th Street, easterly on 45th Street 125 feet by 253 feet 5 inches northerly, parallel with Telegraph Avenue.

In the above-entitled action in the said Superior Court, Case No. 33,995, judgment was entered against said William C. Wallace on January 15, 1912, for the sum of \$392.95, in Volume 91 of Judgments, page 583.

(f) Mortgage: Hattie Hardesty Chapman, a single woman, to E. J. Dinkelspiel, dated September 26, 1911, and recorded September 27, 1911, in Liber 969 of Mortgages, page 475, made to secure the payment of nine hundred and seven and 89/100 dollars (\$907.89) in one day after date, with interest at the rate of eight per cent per annum, according to the terms of a certain promissory note of even date therewith, and also as security for further advances. Covered lot at the northeastern corner of Telegraph



Avenue and 45th Street, northerly along Telegraph Avenue 100 feet by 125 feet easterly on 45th Street.

3. On February 28, 1912, William Carlton Wallace and Hattie Hardesty Chapman, conveyed by grant, bargain and sale deed, [32] said deed duly recorded in Liber 2059 of Deeds, page 44, records of the Recorder's Office, Alameda County, all of that part of the real property hereinbefore mentioned, standing in their names or in the name of either of them, unto Caro Mills, and being described as follows:

“Beginning at a point on the eastern line of Telegraph Avenue, as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of 45th Street (formerly Linden Lane); running thence northerly along said line of Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north  $84^{\circ} 15'$  east one hundred and twenty-five (125) feet; thence south  $12^{\circ} 30'$  west parallel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches to a point on said line distant one hundred (100) feet northerly from the northern line of 45th Street; and thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as said plot is delineated and so designated upon Kellersberger's Map of the Ranchos of V. & D. Peralta, on file in the office

of the County Recorder of the said County of Alameda.”

4. That thereafter on March 8, 1912, Bradford Webster, special administrator of the estate of Leander R. Webster, deceased, executed a release of the mortgage hereinbefore mentioned, which had been made to Leander R. Webster, said release being duly recorded on said date in Liber 1005 of Mortgages, page 425, records of the County Recorder's Office of Alameda County.

5. That on March 18, 1912, William M. Gardiner and A. M. Munson reconveyed the property which they had received as trustees for Serena N. Gardiner, as hereinbefore mentioned, by deed dated March 18, 1912, and duly recorded on same date in Liber 2055 of Deeds, page 305, records of the Recorder's Office of Alameda County.

6. That on April 12, 1912, said Caro Mills executed a deed of trust, duly recorded on same date in Liber 2021 of Deeds, page 389, records of Alameda County Recorder's Office, to Charles T. Rodolph and A. E. H. Cramer, as trustees, to secure the payment to the Union Savings Bank, a corporation, of the sum of five thousand [33] dollars (\$5,000) represented by a promissory note made to said Union Savings Bank by the said Caro Mills. That said deed of trust covered all of the property which had been conveyed by William Carlton Wallace and Hattie Hardesty Chapman unto Caro Mills, as hereinbefore set forth.

7. That on May 14, 1912, E. J. Dinkelspiel executed a release of the mortgage by release recorded

on said date in Book 1016 of Mortgages at page 265, records of the Recorder's Office of Alameda County. Said release released the mortgage recorded in Book 969 of Mortgages, page 475, same records.

8. That on June 8, 1912, said E. J. Dinkelspiel executed a release of mortgage by release duly recorded on said date in Book 1009 of Mortgages, at page 392, records of the Recorder's Office of Alameda County. Said release released the mortgage hereinbefore mentioned recorded in Book 770 of Mortgages, at page 113.

9. That on May 29, 1912, said Caro Mills, by a grant, bargain and sale deed, duly recorded on June 12, 1912, in Book 2067 of Deeds, page 266, same records; that said deed conveyed to The Realty Union, a corporation, the real property hereinbefore mentioned as having been conveyed to said Caro Mills.

10. That on May 28, 1912, by a grant, bargain and sale deed, recorded on June 12, 1912, in Book 2070 of Deeds, at page 258, records of the Recorder's Office of Alameda County, Hattie Hardesty Chapman conveyed to Roosevelt Johnson all that certain real property described as follows:

"All of those lots of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at the point of intersection of the eastern line of Telegraph Avenue with the northern line of 45th Street (formerly Linden Lane) as said avenue and street [34] now exist; running thence easterly along said line of 45th Street one hundred

and twenty-five (125) feet; thence north  $12^{\circ} 30'$  east one hundred (100) feet; thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; thence southerly along said line of Telegraph Avenue one hundred (100) feet, more or less, to the point of beginning.

Being a portion of Plot No. 35, as said plot is delineated and so designated upon Kellersberger's Map of V. & D. Peralta Ranchos, on file in the office of the County Recorder of the said County of Alameda."

11. That on June 29, 1912, said Roosevelt Johnson and wife, by a deed of conveyance recorded July 15, 1912, transferred to The Realty Union, all of the property which as hereinbefore mentioned, was conveyed to the said Roosevelt Johnson. The deed was recorded July 15, 1912, in Book 2092 of Deeds, page 45, same records.

12. That the facts hereinbefore set forth show the transactions relating to the title to the property involved in the complaint from a time prior to the negotiations between The Realty Union, a corporation, and Hattie Hardesty Chapman, which resulted in the making of any deeds by the said Hattie Hardesty Chapman, covering property, that went eventually to the said corporation, and that it was only by the conveyances hereinbefore mentioned that the real property mentioned in the complaint was transferred to said corporation, The Realty Union, and that as to the portion of the said real property hereinbefore particularly specified the same was not transferred by the said Hattie Hardesty Chapman to the said



Realty Union, a corporation, or to any of its agents or officers.

13. The defendant further alleges that subsequent to the time when the said The Realty Union, a corporation, succeeded to said real property, it did with the full acquiescence of the said Hattie Hardesty Chapman, convey and mortgage, subject to the trust deeds, the said real property, without any protest having been made by the said Hattie Hardesty Chapman, and that the transaction [35] last mentioned continued from the time the said The Realty Union, a corporation, received the said real property down to the month of September, 1914.

14. Defendant further alleges that the said Hattie Hardesty Chapman is estopped from claiming that she has any vendor's lien upon any of the property mentioned in the complaint; that said Hattie Hardesty Chapman fully understood that said The Realty Union, a corporation, had, prior to the time of any negotiations between the said Hattie Hardesty Chapman and said corporation, been engaged in issuing and was at said time engaged in issuing, and would therefore be engaged in issuing investment certificates issued to the said Hattie Hardesty Chapman, upon the faith of all the investment certificate holders of a right to exchange such investment certificates for the unimproved real property of said corporation held for sale; that without any demand, notice or protest from the said Hattie Hardesty Chapman, the said The Realty Union, a corporation, subsequent to the time of the issuance of the investment certificate mentioned in the complaint of the

said Hattie Hardesty Chapman, issued investment certificates in the same form as those which had been issued to Hattie Hardesty Chapman, aggregating several hundred thousands of dollars in amount; that as the said Hattie Hardesty Chapman well knew the said investment certificates were purchased by innocent purchasers, and for value, who fully believed that their rights were equal to the rights of other investment certificate holders, and who fully believed that they were acquiring by such investment certificates a right to exchange the same for the unimproved real property of said The Realty Union, a corporation, that might be held for sale, including all the property thereof, and including the property mentioned in the complaint; that as the said Hattie Hardesty Chapman at all times well knew it was a part of the plan and arrangement whereby said investment certificates were issued, that no investment certificate holder had rights over or superior to those of [36] another investment certificate holder; that each certificate holder made an investment by acquiring certificates whereby no right or preference over another certificate holder could be had, or gained, but that all the investment certificate holders were equally concerned and shared the same risks, duties and privileges. That it would be grossly inequitable and grossly unjust to the investment certificate holders of the said The Realty Union, a corporation, to allow the said Hattie Hardesty Chapman, after having speculated upon the rights conveyed by her investment certificates, to recover and retake the land, the title to which was vested in the said, The

Realty Union, a corporation, as hereinbefore averred; that the said investment certificate holders hereinbefore mentioned are the same as those investment certificate holders who have presented their claims in bankruptcy in this proceeding, and the defendant hereby refers to the records and files in this cause for the purpose of making the same a part of this pleading, and for the purpose of showing the number and amounts of the investment certificates of the said The Realty Union, a corporation, outstanding, which were issued prior to and subsequent to the date on which the investment certificates in question received and held by the said Hattie Hardesty Chapman, were issued.

WHEREFORE, plaintiff renews the prayer of his original answer, and asks that the said plaintiff take nothing.

R. H. CROSS,  
J. A. ELSTON,  
BLACK & CLARK,

Attorneys for R. M. Sims, Trustee in Bankruptcy.

(Duly verified.)

[Endorsed]: Filed Aug. 25, 1916, at 1 o'clock and 30 min. P. M. A. B. Kreft, Referee in Bankruptcy.

[37]

(Title of Court and Cause, and Number.)

**(Testimony Taken Before Referee, Armand B. Kreft.)**

**Claim of Hattie Hardesty Chapman.**

Wednesday, March 29, 1916, 2 P. M.

ARMAND B. KREFT, Referee in Bankruptcy,  
Presiding.

**APPEARANCES:**

WM. M. AYDELOTTE, Esq., Attorney for Claimant.

GEORGE CLARK, Esq., and A. H. BRANDT, Esq.,  
Attorneys for Trustee.

Mr. CLARK.—As I understand, it was stipulated in this matter that the plaintiff's complaint filed in this court should constitute plaintiff's complaint in these proceedings; that is, should be considered as a pleading in these proceedings, and that we should file an answer to that complaint in this proceeding, and that the Court should thereupon proceed to determine the question of vendor's lien which is referred to in the complaint, and that this Court should take jurisdiction in the matter and determine that point. That was your Honor's understanding?

The REFEREE.—That is correct.

Mr. AYDELOTTE.—Subject, of course, to the fact that plaintiff waives no rights by virtue of this transfer, but merely submits the matter to this Court for decision under the same rights she would have in the State court. [38]



**Testimony of Hattie Hardesty Chapman, for  
Claimant.**

Testimony of HATTIE HARDESTY CHAPMAN,  
called for claimant, sworn.

Mr. AYDELOTTE.—It is admitted, if your Honor please, that the defendant is a corporation, and that on the 6th day of July, 1912, the plaintiff was the owner of this property; and it is also admitted that the plaintiff conveyed this property to the defendant.

Q. I will ask you, Miss Chapman, to state what was the agreed price, if any, that you were to receive for this property?

A. Well, they agreed to pay me \$160 a foot for the first 100 feet and \$125 a foot for the next 153 feet, and then they were to pay me that at the end of ten years, \$19,000, with interest at six per cent; and then there was a few hundred dollars that they paid me in cash.

Q. I ask you whether or not that property was encumbered at that time, Miss Chapman.

A. Yes, it was mortgaged, and they agreed to pay off the mortgage.

Q. I hand you a letter, Miss Chapman, and ask you when you received that letter.

A. I received this in June.

Q. 1912?      A. Yes, 1912.

Mr. AYDELOTTE.—I desire to offer in evidence this letter and to read it in evidence. I will furnish counsel with a copy of it if he desires, and I would like to withdraw it. I would like to have this letter

(Testimony of Hattie Hardesty Chapman.)  
marked for identification and would like to read it  
into the record and withdraw it.

Mr. CLARK.—No objection.

(Marked: “Petition of Hattie Hardesty Chapman.  
Petitioner’s Exhibit No. 1 for Identification.”)

Mr. AYDELOTTE.—This letter is as follows: It is  
on the letterhead of The Realty Union, First Na-  
tional Bank Building. [39]

**Petitioner’s Exhibit No. 1 for Identification—Letter,  
June 13, 1913, Johnson to Chapman.**

“San Francisco, California, June 13, 1913.

Miss Hattie H. Chapman,  
No. 2225 Pacific Avenue,  
Alameda, California,

My dear Madame: Herewith I enclose my check of  
\$729.36, being the remainder of the amount due to  
you from the purchase of your property on Tele-  
graph Avenue in Oakland. The taxes and releases  
amounted to \$332.56. The amount paid to Mr. Din-  
kelspeil was \$971.00. The amount assumed at the  
Farmers & Merchants Savings Bank was \$3,192.08.  
The amount paid to Mr. Whitehead was \$11,000.00,  
which items, together with your certificates and the  
enclosed check, complete this transaction.

Yours truly,

ROOSEVELT JOHNSON.”

Q. I ask you to state, Miss Chapman, whether or  
not the certificates or papers I hand you, marked  
No. 10,219, calling for \$10,000, and No. 10,220, calling  
for \$9,000, are the certificates referred to in this let-

(Testimony of Hattie Hardesty Chapman.)

ter of Mr. Johnson.      A. They are.

Q. I will ask you to tell the Court in regard to receiving these papers called certificates.

A. I received them on June 6, 1912, I think it was.

Mr. AYDELOTTE.—It is admitted, if your Honor please, that the complaint contains a copy of these certificates, and is on file here as an exhibit entitled "Answer," which I filed to the trustees' petition to sell, and that the exhibits are exact copies of those originals. I offer in evidence these two papers, and desire to withdraw them.

Mr. CLARK.—I would prefer, your Honor, that those papers be left here on file. I will stipulate that after this matter is disposed of, they may be withdrawn.

Mr. AYDELOTTE.—If your Honor please, the reason why I desire this course is this: I have not filed a claim, formally, before this Court, and I desire to do so, and will do so before my time expires. And when I file a formal claim I want to attach these originals to that claim.

Mr. CLARK.—We will consent that they may be withdrawn for that purpose, but we are desirous of having these certificates in, [40] because they are the very foundation of this case; and if this matter should go further I should want those certificates there for the inspection of the Court.

(After argument it was agreed that they should remain in the custody of the Court, to be withdrawn by the claimant after the final determination of the case.)

(Testimony of Hattie Hardesty Chapman.)

Mr. AYDELOTTE.—Then I wish to introduce this certificate No. 10,219 and certificate No. 10,220 as claimant's exhibits.

(Marked respectively: "Hattie Hardesty Chapman, Petitioner's Exhibit No. 2" and "Hattie Hardesty Chapman, Petitioner's Exhibit No. 3.")

Q. At the time of this transaction, Miss Chapman, with whom did you transact business on behalf of The Realty Union?

A. With Mr. Roosevelt Johnson.

Q. Did you know of his official capacity with the corporation at that time?

A. Why, he said he was the manager; the head man of it.

Mr. CLARK.—It will be admitted that he represented the company for all purposes which the testimony proposes to show he represented it for; that he was the vice-president and general manager of the company.

Mr. AYDELOTTE.—Q. Did you have any conversation with Mr. Johnson, Miss Chapman, with reference to the time of the payment of the balance of the \$19,000 on the property?

A. Why, he told me he would pay me that at the end of ten years, and then he was going to pay me six per cent interest. And they have it down that they will only pay every six months, and I said I needed the money oftener than that, so I would rather have it every month; so he said he would do that; he would pay me every month.

Q. I call your attention, Miss Chapman, to the ex-



(Testimony of Hattie Hardesty Chapman.)

hibits, wherein the words "semi-annually" are erased and the word "monthly" is written in the body of the instrument. Is that what you refer to in stating that the time was changed from semi-annually to monthly? [41]

A. Yes. He changed it.

Q. That was changed pursuant to your request that you wanted your interest monthly?

A. Yes, sir.

Q. Was there anything said about the possibility of their paying your money any sooner than ten years?

A. No, he said he could not pay it sooner than ten years. I asked him if I could not get it sooner and he said he could not promise it sooner.

Q. I will ask you whether or not you are still the owner of these promissory notes marked Complainant's Exhibits No. 2 and 3?

A. I think I am. I think you just presented them to the Court for me, though, so I am not sure.

Q. The ownership of those papers has always remained in you? A. Yes.

Q. You have never transferred them? A. No.

Cross-examination.

Mr. CLARK.—Q. Did you ever sell any property before this transaction occurred?

A. Any of what properties? How do you mean? Any property that I have had?

Q. Yes.

A. Yes, I have sold property in Alameda County a number of years ago.

(Testimony of Hattie Hardesty Chapman.)

Q. Did you ever sell any property before this transaction occurred, in which you agreed to wait ten years for your pay?     A. No.

Q. Did you ever sell any property before this time, on credit, without taking security of some kind?     A. No, I got my money right away.

Q. Did you consult any one in connection with this transaction, at all?

A. Yes, I had a man that arranged the sale for me.

Q. Was he an attorney or a real estate dealer?

A. Well, he had been an attorney but he was not practicing at that time.

Q. Who was that man?

A. Well, he was a friend of mine. Do you wish me to tell the name? [42]

Q. Well, I am not particular. But you did consult with that man who had had experience in real estate matters, did you, and a man who had had some experience in law matters?

A. Yes, he was supposed to have. He had not been practicing for a good many years, though.

Q. He was a man of about what age?

A. I think he was about 52, perhaps.

Q. Did he put this deal through for you? That is, was it he who, so far as you were concerned, originated or arranged for this deal?

A. Well, he told me about it, and so I decided to do it. That was all. I went up to Mr. Johnson, Roosevelt Johnson, to sell him the property.

Q. Was this proposition your proposition or Roosevelt Johnson's proposition? Were you en-

(Testimony of Hattie Hardesty Chapman.)

deavoring to sell your real property?

A. I had had no other offer for it, but I wanted to sell it, as it was encumbered, and it was an expense to me, and I thought this was a good opportunity to sell it if he wanted to buy.

Q. Had you listed this property with the man to whom you refer, for sale, telling him that you would like to have him find some one who would take it off of your hands?

A. I don't know as I asked him that, but he knew it was kind of bothering me, keeping up the taxes and all that, and I wanted to get rid of it. And as it was a hard matter to sell property at that time, I was glad to see Mr. Johnson and talk about it.

Q. And you thought that this was a very favorable price, did you?

A. I thought it was all right.

Q. Now had you told this man that you would like to sell this property?      A. Had I told him that?

Q. Yes.      A. No, I had not told him that.

Q. How did the Realty Union become acquainted with the fact that you were desirous of selling this property?

A. Well, I suppose [43] they must have known it was a good piece of property, and they probably had their eye on it and they wanted it, and they probably found out who owned it.

Q. Did you fix any price on it yourself, or did they suggest the price?

A. Well, I don't just remember how we came to that decision.

(Testimony of Hattie Hardesty Chapman.)

Q. Were there any other negotiations in regard to it, in writing, except those that are expressed in that letter that is read in evidence?

A. Not that I remember.

Q. That was the only writing that passed between you and the Realty Union?

A. I don't remember any other now.

Q. Now they told you that they would take care of this mortgage?     A. Yes.

Q. They said they would pay it off?     A. Yes.

Q. So that you never would be bothered with any possibility of any deficiency or any claim on account of the mortgage? They told you that, did they?

A. Yes, they told me they would pay off the mortgage.

Q. That they would clear off the mortgage?

A. That they would attend to all that.

Q. Now you understood that this company was a concern which was buying real property, did you not?

A. Of course I understood that they were buying property, yes.

Q. And did you read these certificates when you received them?

A. I think Mr. Johnson read them over to me.

Q. Where were you when he read them over to you? Where was it that you think he read them over to you?

A. It was up in his office, in the First National Bank Building.

Q. How long before that had it been suggested to



(Testimony of Hattie Hardesty Chapman.)

you that you should take these investment certificates? Right at the time when the proposition was first mentioned was it suggested that you [44] take these investment certificates?

A. Why, I don't know when we discussed it. I told them what property it was and so they said they would pay me in those notes.

Q. Did they call them notes or did they call them realty investment certificates when they first mentioned them to you?

A. Well, they probably called them that, I guess. That is their title to show for what property they got,

The REFEREE.—Q. You mean the investment certificates?

A. I don't remember just what was said. It is kind of hard to remember.

Mr. CLARK.—Q. You at that time had seen and read promissory notes, had you not? A. What?

Q. You at that time, at the time of these negotiations, and prior to that time, had read and were familiar with an ordinary promissory note?

A. Well, I don't know that I was. I never had any promissory note given to me. I never had any interest in knowing anything about them.

Q. Were you a graduate of any school? A. No.

Q. Had you gone to school?

A. Once, a little while.

Q. But you had had a start in business training, and had done some little in the way of business, so you had read promissory notes and knew what a promissory note was?

(Testimony of Hattie Hardesty Chapman.)

A. I don't know that I ever had read a promissory note.

Q. What was your age at that time?

A. That is rather a familiar question.

Q. Approximately. I just want to get this because I have to have it in the record. Were you thirty years old at that time? A. Yes.

Q. Did you talk with your mother about this transaction when it occurred?

A. Oh, I spoke to her about it; yes.

Q. How often did you talk with your mother about it? A. I don't know that. [45]

Q. Well, how often did you talk with this gentleman who was advising you with respect to this matter?

A. I can't say how often I spoke to him. I spoke to him a number of times, I guess.

Q. How many times?

A. I don't know how many times.

Q. Were you living at home with your mother?

A. Yes.

Q. At this time? A. Yes.

Q. And she knew that this transaction was about to be consummated? A. Yes.

Q. Now, it is your impression that you either read this investment certificate there, or it was read to you at the time you accepted it? A. Yes.

Q. When this was read to you, Miss Chapman, did you notice that there was in this certificate a promise to pay to you something in the way of dividends in the event that the dividends in this company ex-

(Testimony of Hattie Hardesty Chapman.)

ceeded a certain specified amount?

A. Yes, I remember that.

Q. You remember that? You knew that this was a company which was buying and selling real property, didn't you? A. Yes.

Q. And that that was the way in which, if it paid dividends or profits, it was hoping to make them? You understood that, didn't you?

A. Well, I didn't think that the dividends would amount to anything, particularly to me, because I thought, well, if they had to make money, why, it would simply increase my interest.

Q. That is, it would simply be added to what you would get?

A. Instead of my getting six per cent, why, perhaps they might be able to pay me seven per cent; something like that.

Q. But you did understand that if this company made money it would make it by buying and selling real estate, didn't you?

A. Why, yes, that is what I understood.

Q. Well, now, as regards this particular piece of property which you turned over to them, you fully understood that that piece of [46] property would pass right into the usual amount of property which they had, and that they would deal with that just like they would deal with any other item of property, didn't you?

A. Well, I supposed they would try to sell it and I expected them to pay me for it.

Q. You expected them to pay you for it, but at the

(Testimony of Hattie Hardesty Chapman.)

same time, knowing the business in which this concern was engaged—

A. (Int.) I didn't want to give it to them for practically nothing.

Q. At the same time, you didn't expect them to sit down and hold that piece of property until the end of ten years?

A. I didn't know how they were going to get my money to pay me.

Q. But you knew that this concern was a concern, as you have stated, which bought and sold real property? A. Yes.

Q. That was clear in your mind? And that if it made any of this extra per cent price or dividends which they referred to, that it would make them by buying and selling real property, any such real property as they had? You understood that, didn't you?

A. Why, yes.

Q. There was no restriction put by you at the time of these negotiations, upon them, in the nature of a provision against their selling or dealing with this particular piece of property that you turned over to them?

A. Why, no; I didn't care how they got me my money as long as they kept their word and paid me the money they owed me.

Q. You didn't expect that this particular piece of real property would be reserved in any way, did you, and treated by them any differently than any other piece of real property which they might hold?

A. I didn't think anything about it. I just sold



(Testimony of Hattie Hardesty Chapman.)

them the property, and they were expected to get me the money in ten years and to pay me my interest regularly. They paid me the [47] interest up to a certain time, and then they stopped.

Q. Well, now, this particular certificate that I now hold—they both read the same. This is the one that promises to pay \$9,000. It also states: "This certificate is transferable only upon endorsement and surrender. Any owner of investment certificates of a paid-up value of not less than \$100 may exchange them for unimproved realty held for sale by the corporation." A. Yes, sir.

Q. Did you understand that simple language inserted in that certificate?

A. I didn't pay any attention to it, because I didn't want any unimproved property. I had just gotten rid of unimproved property and I had been promised something for it, and I wanted my money. I didn't want unimproved property for it. So I was not going to exchange my certificate for any unimproved property. I didn't want that.

Q. Suppose there had been a piece of unimproved property which in your judgment was likely to rise materially in value, and which was being held by the Realty Union at a low price, don't you think that you would have desired to turn in this investment certificate at its face value and procure that real property and hold it?

Mr. AYDELOTTE.—Just a moment. We object to that question on the ground that it is incompetent, irrelevant and immaterial and not proper cross-ex-

(Testimony of Hattie Hardesty Chapman.)

amination, and has nothing to do with the issues of the case.

The REFEREE.—The objection is sustained.

Mr. CLARK.—Q. Well, referring to this language here which you have just to some extent elucidated, you clearly understood this clause in this investment certificate: “Any owner of investment certificate of a paid-up value of not less than \$100 may exchange them for unimproved realty held for sale by the corporation”? You understood the meaning of that simple clause in that certificate, didn’t [48] you?

A. I guess I did. I didn’t think much about it, though.

Q. Well, now, let me ask you this: At this time you stated that these properties of yours were unimproved. A. Yes.

Q. These that you turned over to the Realty Union? A. Yes.

Q. When this certificate was issued to you, you saw that it had a certain number upon it, didn’t you? Both of these certificates were numbered?

A. Yes.

Q. And you also understood that these investment certificates were a form of document or a contract that was being issued by this Realty Union at this time, didn’t you?

A. I understood that they issued those, yes.

Q. They issued them in exchange for property or for cash?

A. I don’t know exactly what you mean.

(Testimony of Hattie Hardesty Chapman.)

Q. What I mean is, you knew that they were engaged in turning these things out or dealing in these things, delivering these things to the public for a consideration? That that was the character of this concern? That that was one of their sources of revenue?

A. I don't know that I thought anything about its being one of their sources, or anything of the kind. I simply knew that I was selling to them and that they promised to pay me at such and such a time. And I believed that they were reliable.

Q. Is the statement which you made just a moment ago correct, that you did at that time understand that they were issuing certificates like these?

A. Well, I had never seen one before I got that.

Q. No, I am not asking whether you had ever seen one before. Was there anything connected with the transaction, or from your prior knowledge or from what you knew of the concern—you said you knew of them before—was there anything from which you at that time thought or understood that the corporation was issuing these investment certificates?

A. I didn't know even the name of them. I didn't know if they called them investment certificates.

Q. Aside from that. Aside from whether you knew the name of them [49] or not, did you understand that this company was issuing these investment certificates and paying interest on them at this time?

A. I knew they paid interest on—I don't know. You are getting me kind of rattled.

(Testimony of Hattie Hardesty Chapman.)

Q. What I mean is just this. It is a simple proposition: whether you knew that this company had been issuing other certificates to other people in the same way that they were issuing these certificates to you. What was your impression in regard to it?

A. Well, I supposed that they had been dealing with other people; that they were dealing with other people; and that they had the same method of dealing with them that they had with me.

Q. That is not a full answer to the question. My question is whether it was your impression that this company had outstanding, other certificates. Well, I supposed they had.

Q. Well, now, you have just mentioned here a moment ago that Mr. Johnson scratched out on this form, the words "semi-annually." You saw that they had these printed forms there?

A. That was just after we had been talking it over and I had about decided to let them have the property.

Q. You saw that they had these lithographed forms?

A. I had not thought particularly about that.

Q. What I mean is this: You fully understood that these were not the only two certificates which the Realty Union had issued or was going to issue?

A. No, I didn't think they had only two.

Q. Now, when Mr. Johnson referred to this matter here of paying interest semi-annually, he told you that that was the period of time for paying interest on their certificates generally, didn't he?



(Testimony of Hattie Hardesty Chapman.)

A. He said that that was what he wanted to pay, and I said that I would rather have mine every month instead of that long, because I needed the money. [50]

Q. He told you that this was the regular interval for paying the interest?

A. He didn't say anything about its being the regular interval. He read it to me and I said I would rather have mine every month, and he said he would arrange it in that way.

Q. Yes. Well, now, you said that you didn't have any idea of turning these things in for unimproved real property. Was that your answer?

A. No, I hadn't thought about it, because I didn't want any more unimproved property. I needed the money.

Q. How long was it after you got these investment certificates before you did in fact apply to the Realty Union Company for an exchange of unimproved property for your instalment investment certificates? A. How long afterwards?

Q. Yes.

Mr. AYDELOTTE.—Mr. Reporter, please read the question. (Question read.) I object to that upon the ground that it assumes a fact as proven which has not been proven.

The REFEREE.—The objection is sustained.

Mr. CLARK.—I withdraw the question.

Q. Did you, after you received those investment certificates request of your attorney or of any one else that they apply to the Realty Union for unim-

(Testimony of Hattie Hardesty Chapman.)

proved realty to be received by you in exchange for your investment certificates?

A. Did I apply to my attorney? (Question read.)  
Let me see. The first of the year I—

Q. (Int.) This last year, you mean? A. Yes.

Q. Because this concern was adjudicated a bankrupt in August or September last year.

A. I told my attorney that I thought it would be a good idea if he were to find out whether they had any unimproved property that I could exchange for. I told him to find out what they had.

Q. Did you further request your attorney to exchange these instalment investment certificates for unimproved real property if they [51] had any that was for sale and was desirable?

A. Well, I thought if they had I naturally would want to talk that over after I found out.

Q. Now, did you understand that any other persons were making a similar request of the Realty Union? A. To exchange?

Q. Yes.

A. I think I heard that people were trying to get property.

Q. For their certificates? A. Yes.

Q. Well, now, when you received those investment certificates, and understanding that language in those investment certificates about the privilege of exchanging them for real property, you fully understood that the Realty Union might put this very piece of property that they got from you on sale or exchange for certificates, didn't you?

(Testimony of Hattie Hardesty Chapman.)

A. No, I didn't think anything about it, actually.

Q. Well, you knew your piece of property was unimproved?

A. I imagined they would want to hold it so that it would increase in value.

Q. But as regards their right to sell it if they desired, you fully understood that it was unimproved real property, didn't you?

A. I understood that.

Q. And you understood that these certificates contained this clause about permitting people to turn in the certificate and receive property in exchange for it? A. Yes.

Q. You understood that. So far as the Realty Union was concerned, and what they stated they would be willing to do, was not the proposition from the very outset that they would satisfy your demand to the extent of \$19,000 altogether with certificates, investment certificates?

A. What did those certificates mean to me? They meant only that they were going to pay me so much money, didn't they? What did I want of their little certificates? They [52] didn't mean anything to me except that they promised to pay me so much. It was \$19,000. I didn't care about their little certificates. I only wanted their money. That is the way I had of their putting it down, to show me when they would pay it. So I took their certificates. Otherwise they would not appeal to me. Would they appeal to you? I didn't want to frame them.

Q. At that time they might have appealed to me.

(Testimony of Hattie Hardesty Chapman.)

A. They didn't to me.

Q. What I mean is this: They never at any time said to you that they would pay you \$19,000 in cash and assume this mortgage?

A. They certainly did. Mr. Roosevelt Johnson said they would pay me \$19,000 at the end of ten years, and he issued those ten-year certificates bearing six per cent interest every month.

Q. Did he state that this, however, would be paid only in investment certificates? Didn't he say that?

A. No, he told me he would pay me in hard cash. He didn't say anything about investment certificates.

Q. Did he state that so far as the company was concerned, that the only way in which the company could satisfy this demand at the present time was by giving investment certificates?

A. He said he could not pay me the money now, but he would give me these papers, or whatever you call them, and he would give me my money at the end of ten years.

Q. Had you at this time heard of any other people having bought these investment certificates?

Mr. AYDELOTTE.—We object to that question as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled. (Question read.) A. No.

Mr. CLARK.—Q. Had you never heard in your life, prior to the time of receiving these investment certificates, of any other human being [53] who had received any of them?

A. I didn't know of a soul that had ever had one



(Testimony of Hattie Hardesty Chapman.)

of those investment certificates, or those notes.

Q. Did you talk over with this friend of yours the propriety of receiving these investment certificates? A. I talked it over with him, yes.

Q. What did you tell him?

A. Well, I said I would look into the matter.

Q. You told this man that you would look into the matter?

A. Yes. I think I did. I can't remember my exact words. It is so many years ago now.

Q. What did he say to you about these investment certificates?

A. Well, I suppose that he must have thought that they were all right. I can't remember what he did say.

Q. How long did you deliberate on the question whether you would or would not receive investment certificates? A. I don't remember that.

Q. Do you think that you just simply accepted them instantly in lieu of cash?

A. No, I thought it over, but I don't remember just how long I thought it over.

Q. How long was it between the time of taking the investment certificates and your talking of taking them?

A. I don't know. I really can't remember.

Q. Did you talk with your mother about receiving these investment certificates?

A. Oh, I talked to her about selling this land to the company.

Q. Did you talk to your mother about receiving

(Testimony of Hattie Hardesty Chapman.)

these investment certificates?

A. I don't remember that. I can't remember that long, what happened.

Q. You say you were living at home with your mother?

A. I talked with her about selling to them, naturally, and my mother [54] said she didn't know anything about the company, so I don't know whether I talked very much to her about it.

Q. Did you talk to your mother about this company at the time?

A. Oh, I remember asking her if she knew anything about it, and I think she said she didn't know much about the company, and wanted me to use my own judgment.

Q. Did you ask this gentleman that you wrote to, whether he knew anything about the company?

A. Yes.

Q. What did he tell you?

A. He said he thought the people in it were very good, honest and reliable people, if I remember rightly.

Q. Did you talk with any one else than this gentleman about it? A. I don't remember that I did.

Q. Did you mention the fact that it was suggested that you take \$19,000 in investment certificates?

A. I don't remember.

Q. You don't remember that you told a living soul that you were contemplating taking \$19,000 in investment certificates of the Realty Union?

A. I don't remember that I did. I am not a per-

(Testimony of Hattie Hardesty Chapman.)

son that goes around telling my business to everybody.

Q. Would you say that you didn't suggest it to any person?

A. No, I wouldn't say that, because that might not be the truth.

Q. Is it your impression that you did mention to this gentleman that you were going to take, or that you were considering taking investment certificates?

A. What gentleman?

Q. This man that you referred to. Did the company make you a cash offer, any cash offer for this at all? I mean spot cash. A. No.

Q. You say it was about the first of the year 1915 that you told your attorney to see whether he could turn these certificates in and get some unimproved property for it? A. What is that?

Q. I ask you, wasn't it about the first of the year 1915 that you asked him to see whether he could turn these certificates in for [55] unimproved property? A. I don't remember.

Mr. AYDELOTTE.—My best recollection is that it was about the first week in March, 1915; about that time. But I don't wish by my answer to admit any of the facts stated by counsel or assumed by counsel in his question.

Mr. CLARK.—Q. How many times did you speak to your attorney about this matter of turning in these investment certificates for unimproved real property?

Mr. AYDELOTTE.—We object to that question as incompetent, irrelevant and immaterial, and as-

(Testimony of Hattie Hardesty Chapman.)

suming a fact not proved, that she ever spoke to her counsel about exchanging any certificates.

Mr. CLARK.—Q. Did you ever speak to your counsel about exchanging any certificates for real property?

A. No, I didn't say that. I told you I asked him about getting a list of properties that they had to exchange. I didn't tell you that I asked him to exchange, or asked the company to exchange.

Q. Why did you want a list?

A. I wanted to see what they had.

Q. Had you in mind the turning in of your investment certificates at that time for unimproved real property?

Mr. AYDELOTTE.—We make the same objection.

The REFEREE.—The objection is overruled. (Question read.) A. No.

Mr. CLARK.—Q. What did you want the list for?

A. Well, maybe if I had seen the list and they had anything very fine, I might have considered it. But I did not consider it.

Q. Now when you made these enquiries about the Realty Union, what was your object? A. What?

Q. In making these enquiries.

A. Because I was thinking of selling my land to them, and if they were not good people I certainly did not want to give them my property.

Q. You didn't want to extend to them a ten years' credit? [56]



(Testimony of Hattie Hardesty Chapman.)

A. I didn't want to sell to them and take their note unless they were good, reliable people.

Q. So far as you were concerned, you were satisfied that this \$19,000 was going to be paid, because you believed they were entirely solvent?

A. I thought they were good people or I certainly would not have sold to them.

Q. You were looking at that time, in making your enquiries about their solvency and their financial standing, to their promise to pay you, and not to any particular piece of real property as being security? Isn't that the fact?

A. Well, I told you, I was investigating to see who was conducting this company. That was the first. When do you mean?

Q. When you made this deal, and when you were making this investigation as to the financial condition of this company, you understood that if you took these documents or these papers for \$19,000, that you would be looking to the company and not to any particular piece of real property as security for the payment of these instruments? Isn't that the fact?

Mr. AYDELOTTE.—We object on the same ground; incompetent, irrelevant and immaterial and not definite; an assumption of fact not proven.

The REFEREE.—The form of the question is rather complex.

Mr. CLARK.—I withdraw the question.

Q. You have told us that you spoke to this gentleman and that you talked to your mother, and that

(Testimony of Hattie Hardesty Chapman.)

your impression would be that this gentleman told you that this concern was all right. And you were making some enquiry, as I understood you, to find out whether this was a concern that would pay its debts. Isn't that right?     A. Yes.

Q. And you satisfied your mind in regard to that, didn't you?     A. I thought I did; yes.

Q. Then when you took these certificates you understood that you [57] were looking to the company generally, for the payment of the money, and not looking to any particular piece of real property as security for the payment of the money? Isn't that the fact?

A. When I took their notes I understood that they were going to pay me in a certain time, and I didn't think about—I thought they were good people and that they would pay me. I didn't think just about a particular piece of property, but I thought that they were all right.

Q. You never suggested that they give you back a mortgage on this piece of real property?

A. I didn't suggest anything like that.

Q. You didn't suggest that they make you an instrument that would indicate that this particular piece of real property would be security for the payment of this money?

Mr. AYDELOTTE.—Do you mean at the time she received the certificates?

A. I didn't suggest that they give me any mort-

(Testimony of Hattie Hardesty Chapman.)

gage, no. I simply took their notes, and I thought that was all right.

Q. And you fully understood that it was necessary for you to make enquiry as to the financial standing of this company?

A. I wanted to find out whether they were good, honorable men, and they all seemed to be fine men, and so I thought it was all right, simply because they were men of good standing. I was told that they were all men of fine reputation at that time, or I am sure that I would not have sold to them and accepted their notes. I didn't go into worrying about it otherwise. I thought it was all right. I didn't think they were going to try to hold me up or take my land away from me.

Q. Did you conclude in your mind that they were a solvent concern from which it would be safe to accept a promise to pay ten years from date?

A. I did.

Q. You did? You at least made investigation sufficient to bring [58] you to that conclusion?

A. Yes.

Q. Who told you that this concern dealt in real property?

Mr. AYDELOTTE.—When.

Mr. CLARK.—At that time or any time.

Q. This friend of yours? A. Yes.

Q. Did he tell you where its holdings were?

A. I understood that they were in Oakland and Berkeley.

Q. That it was principally an Alameda concern,

(Testimony of Hattie Hardesty Chapman.)

holding property in Alameda County?

A. That is what I understood.

Q. Did he tell you how long he had been familiar with it or its members?      A. This friend?

A. Yes.      A. No.

Q. He did not?

A. I don't remember; no.

Q. Was the \$11,000—how was that paid?

Mr. AYDELOTTE.—If you know.

Mr. CLARK.—Q. You have introduced a letter signed by Roosevelt Johnson, addressed to Miss Chapman, stating that the taxes and releases amounted to \$332.56; that the amount paid to Mr. Dinkelspeil was \$971; that the amount assumed at the Farmers & Merchants' Savings Bank was \$3,192.08; that the amount paid to Mr. Whitehead was \$11,000. What was that paid to Mr. Whitehead? What was that demand?

A. Those were liens or mortgages on the place.

Q. Those were liens or mortgages on the place?

A. Yes.

Q. You received cash how much? You received a check for \$729.36 which was cash, did you?

A. Yes.

Q. And they paid off against the property, taxes and releases and so forth, \$332.56, and they paid something to Mr. Dinkelspeil for you, did they?

A. Yes.

Q. Did you understand you were to turn over this property to the company directly?

A. I sold to The Realty Union, yes.



(Testimony of Hattie Hardesty Chapman.)

Q. To whom did you execute the deed? [59]

Mr. AYDELOTTE.—The deed will show.

Mr. BRANDT.—Q. Was it after or prior to the transaction in which property had been deeded to Caro Mills?

Mr. AYDELOTTE.—We object. The writing is the best evidence.

Mr. CLARK.—I would like to have a statement from counsel as to how long that property was held by Caro Mills before these certificates were received. I understand Caro Mills was one of the officials of the company, or that he was connected with the company.

Q. You turned this property over first, to some one connected with the company, didn't you?

A. I sold to the Realty Union. It didn't make any difference who was standing up for them or taking the property. The Realty Union paid me and I didn't have any dealings with anybody else.

Q. Did you know that Caro Mills paid off a mortgage on this property for \$5,000?

A. No, I didn't know that. I was surprised afterwards when I saw that Caro Mills had gotten it. I didn't know Caro Mills or anybody but the Realty Union, in the transaction.

Q. Was this \$5,000 part of the \$11,000?

Mr. AYDELOTTE.—If you know.

A. No, I don't know anything about it.

Mr. CLARK.—Q. Was the \$5,000 part of the \$11,000?

A. I don't know anything about that.

Mr. BRANDT.—Q. Do you remember the trans-

(Testimony of Hattie Hardesty Chapman.)

action with Mr. Whitehead about that particular property?

A. I had forgotten. I just knew that I was selling to the Realty Union. I didn't think anything about who was transacting the business for me.

Q. Was it all one transaction?

A. No, I think it was in two.

Q. Didn't you first transfer the property to Caro Mills, and then didn't it go through Mr. Whitehead?

A. I think the first part of it was—I found out afterwards was Caro Mills, but the name didn't mean anything to me at that time. [60]

Mr. CLARK.—Q. Did you borrow any money on this property after it was turned over this way, before you consummated the deal with the Realty Union?

A. No.

Q. When were these liens put on the property?

A. Which liens?

Q. You say certain mortgages were put on.

A. Those were on before I got the property.

Q. How long before you held this property?

A. I don't know. I held it quite a while.

Q. About how long? A. I don't know.

Mr. AYDELOTTE.—I object to that as immaterial.

Mr. CLARK.—Q. What did you pay for it?

Mr. AYDELOTTE.—I object to that as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is sustained.

Mr. CLARK.—Q. You say the mortgages were

(Testimony of Hattie Hardesty Chapman.)

given by someone else before you got the property?

A. The mortgages were on.

Q. Are you sure you didn't sign or renew any of the mortgages after this property was turned over to you?

A. I am not sure about that. You can find it if it is in the records.

Q. What is your best impression?

A. I really don't want to say, because I can't remember. And I think you can look at the records.

Q. Will you tell us then about how long you held it after you got it?

Mr. AYDELOTTE.—I submit that that is immaterial.

The REFEREE.—I will allow the question to be answered.

A. I can't remember just how long. I would hate to tell you things that might not be so.

Mr. CLARK.—Q. Were there not any notes or mortgages then against that property?

A. I am not sure of that either.

Q. Would you not remember so important a circumstance as your executing [61] a note and mortgage upon a piece of property?

A. I don't know. A mortgage may have been changed or something. I can't remember exactly.

Q. What makes you think that it may have been changed?

The REFEREE.—There ought to be a record of these things.

Mr. CLARK.—Q. You understood, though, that at

(Testimony of Hattie Hardesty Chapman.)

the time this property was taken over by the Realty Union, that it was going to assume and pay those mortgages?     A. Yes.

Q. That is distinct in your mind, that they were going to pay them?

A. Yes, I remember that, because Mr. Johnson wrote and told me that they did.

Q. Have you the letter here wherein he told you?

A. I think you have that; the one you were reading.

Q. This is the letter you refer to? (Referring to Petitioner's Exhibit No. 1.)     A. Yes.

Q. That was understood right at the outset that they were going to assume and pay off those mortgages?     A. Yes.

Q. And clear that property of the debt?

A. Yes, that was a part of the price.

Mr. BRANDT.—Q. Do you remember whether there had been threatened foreclosure proceedings on the 153 feet parcel?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled. Answer the question.

A. I don't remember that.

Mr. BRANDT.—Q. Do you recollect taking up at that time with Mr. Whitehead the question of taking over that mortgage on the 153 feet?

Mr. AYDELOTTE.—We make the same objection.

The REFEREE.—Overruled.



(Testimony of Hattie Hardesty Chapman.)

A. I have forgotten about that. I don't know. I didn't think [62] anything about this.

Mr. BRANDT.—Q. What I have in mind is whether it was not the fact that after Mr. Whitehead had taken over the property from you, that an agreement was made whereby he was to give you thirty days in which to redeem?

Mr. AYDELOTTE.—I make the same objection.

The REFEREE.—The objection is overruled.

Mr. BRANDT.—The question is withdrawn.

Q. Do you recollect any agreement with Mr. Whitehead by which he was to take the title to the property in Caro Mills, his nominee and he was to pay off and discharge the mortgage and give you 30 days within which you could get the property back?

Mr. AYDELOTTE.—We make the same objection.

The REFEREE.—The question is whether she remembers such an arrangement.

Mr. BRANDT.—Q. Do you remember such an arrangement with Mr. Whitehead?

A. I don't remember.

Q. Did you yourself execute a deed to the property? Or do you recollect it? To the Realty Union, I mean?

A. I signed my name to it.

Q. Do you recollect about any transaction with Mr. Whitehead?

A. I have forgotten.

Redirect Examination.

Mr. AYDELOTTE.—Q. As a matter of fact, Miss

(Testimony of Hattie Hardesty Chapman.)

Chapman, didn't you have your dealings with Mr. Johnson, and do whatever Mr. Johnson told you to do with reference to the signing of the papers and the making of the transfers?     A. Yes.

Q. Isn't it a fact, Miss Chapman, that Mr. Johnson, at the time of the handing to you of these promissory notes which counsel designates by the high-sounding name of investment certificates [63] did you have any conversation with him at that time about your holding these promissory notes and not selling them?

A. He told me not to sell them, he said, because it was all right, and I would get my money in ten years. And he said it would be fine for me, and that I would get my money in ten years and would get my interest every month.

Q. Did he state anything to you about the Realty Union holding this property because it was good property?

A. Yes, he told me that this was valuable property and "we are going to hold that until the very last," because he said, "it will increase in value."

Q. I will ask you, if it is not a fact, Miss Chapman, that you called upon Mr. Johnson with reference to exchanging—or with an enquiry in your mind about exchanging these certificates for property, and whether you did have a conversation with Mr. Johnson on that very point.     A. Yes.

Q. And what did Mr. Johnson tell you with reference to the exchange of property, if anything?

A. He told me, he said, "I would not advise you,

(Testimony of Hattie Hardesty Chapman.)

Miss Chapman, to exchange for any of the property," because he said, "If we stick together here," why, he said, "We will pull through all right." I said, "Mr. Johnson, I think you can take better care of it than I can."

Q. I will ask you if this conversation, together with the conversations which counsel has asked you about a few moments ago with reference to liens on the property—I will ask you if it is not a fact that all of those conversations were with reference to a possibility of a compromise settlement of this difficulty, and that they all occurred after the Realty Union had defaulted in the payment of interest on these notes? A. Yes, they occurred afterwards.

Q. I hand you a letter, Miss Chapman, and ask you if you received [64] that letter from the Realty Union? A. Yes.

Mr. CLARK.—We have no objection to that letter, your Honor.

Mr. AYDELOTTE.—I desire to introduce this letter in evidence and ask to have it marked "Exhibit No. 4." I will read it into the record and will hereafter withdraw it.

Mr. CLARK.—We will waive the reading of it. I would like to have the exhibits stay here.

Mr. AYDELOTTE.—I don't care. I will leave them here with the understanding that I may withdraw them to make my record.

Mr. CLARK.—Not while the case is on.

Mr. AYDELOTTE.—Oh, no, but for making my record.

(Testimony of Hattie Hardesty Chapman.)

(The document was marked: "Petition of Hattie Hardesty Chapman. Petitioner's Exhibit No. 4." Following is a copy of the exhibit:)

**Petitioner's Exhibit No. 4—Letter, March 15, 1915,  
Johnson to Chapman.**

**"THE REALTY UNION.**

**FIRST NATIONAL BANK BUILDING.**

**San Francisco, California, March 15, 1915.**

*Mrs. Hattie Hardesty Chapman,*

*No. 2225 Pacific Ave.,*

*Alameda, Cal.*

Dear Madame: Owing to the present unavailability of money for investment in securities, due to the effect of European conditions, together with national and local causes, the Realty Union has decided to discontinue the sale of its securities, and to prepare its properties for marketing, using the proceeds thereof for the repayment of its Investment Certificates.

It may be, during the period which will be required to prepare its properties for the market and to institute sales, and which will probably be several weeks, that payments upon Investment Certificates will have to be withheld.

In this event we ask the full co-operation of our investors in the foregoing plan, which we believe will bring much swifter returns to them than any other that could be adopted in view of the present condi-



(Testimony of Hattie Hardesty Chapman.)

tion of the money market.

Very truly,  
ROOSEVELT JOHNSON,  
Manager."

Mr. AYDELOTTE.—I offer in evidence this letter, dated April 8.

(Marked: "Petition of Hattie Hardesty Chapman. Petitioner's Exhibit No. 5." Following is a copy of the exhibit:)

**Petitioner's Exhibit No. 5—Letter, April 8, 1915,  
Johnson to Chapman.**

"THE REALTY UNION.

FIRST NATIONAL BANK BUILDING.

San Francisco, California, April 8, 1915.

Miss Hattie Hardesty Chapman,

No. 2225 Pacific Ave.,

Alameda, Cal.

Dear Madame: We now have a number of our properties for marketing. [65]

If you contemplate purchasing land for a home or for investment in Oakland or in Berkeley, our representative will be glad to call upon you with maps at your request.

Very truly,  
ROOSEVELT JOHNSON,  
Manager."

Q. I will ask you to state, Miss Chapman, if it is not a fact that the conversation with Mr. Johnson to which you have referred, in which you state that Mr. Johnson advised you not to turn in these so-called

(Testimony of Hattie Hardesty Chapman.)

certificates for property, and the time in which your attorney went to see Mr. Johnson with reference to getting some lists of these properties, if that was not after the receipt of both of these letters referred to as Plaintiff's Exhibits 4 and 5, together with another conversation with Mr. Johnson with reference to the possible execution of a mortgage on this identical property and the execution of a new note to run for three years—if all of these things which I have just stated was not in pursuance of an attempt to a possible compromise of this difficulty?

Mr. CLARK.—We object to that question as compound, complex, mixed, leading and suggestive.

The REFEREE.—A portion of it has been testified to. There is some new matter. The objection is sustained. There are some facts not in evidence assumed in the question.

Mr. AYDELOTTE.—I will put it this way:

Q. I will ask you whether or not you had any conversation with Mr. Johnson with reference to the exchanging of these so-called certificates for property otherwise than as a compromise proposition after consultation with your attorney?

Mr. CLARK.—We object to that as called for a conclusion.

The REFEREE.—Sustained.

Mr. AYDELOTTE.—Q. You were asked on cross-examination, Miss Chapman, what conversation you had with your attorney with reference to getting a list of property. Will you state what that conversation was, with your attorney?

(Testimony of Hattie Hardesty Chapman.)

A. I just asked you to get the list, didn't I? [66]

Q. For what purpose?

A. As I stated before, if the property was good, I would exchange it.

Q. I will ask you if that was done in pursuance of a proposition discussed with Mr. Johnson, to an amicable settlement of this matter.

Mr. CLARK.—We object to that as calling for a conclusion.

Mr. AYDELOTTE.—I will withdraw it.

Recross-examination.

Mr. CLARK.—Q. Now, you are quite distinct in your impression that Mr. Johnson told you that they had in mind the holding of this piece of property that they got from you, because they thought it would increase in value?

A. Yes.

Q. Well, did you expect, when he told you that, that if it increased in value so that there was a chance for a selling of it at a good profit, that they would sell it at a good profit?

A. Why, sure they would have. That is business, isn't it?

Q. That is business in that business. Now, you also stated that you had a talk with him, with Mr. Johnson, in which he told you that he would advise you not to exchange your certificates for real property. Did you have such a conversation?

A. I had a conversation with Mr. Johnson, yes, in which he said he would not advise me to exchange.

(Testimony of Hattie Hardesty Chapman.)

Q. Now then, you went to see Mr. Johnson independently of your attorney, didn't you?

A. I went there by myself, yes, to see if I could not get my interest.

Q. Was that before you saw an attorney about this matter at all?

A. No, I think it was after I had seen my attorney.

Q. After you had seen him? Did you go there with your attorney's knowing that you were going? Was it by the advice of your attorney that you were going to see Mr. Johnson?

A. I went there several times. Sometimes he knew I was going to see him and sometimes he did not. [67]

Q. Did you, on more than one occasion talk with Mr. Johnson about exchanging these certificates for unimproved real property?

A. I have forgotten that. But I know this time he advised me so strongly to not exchange, because he said if everybody would not rush in on them, that they could save it.

Q. But up to that time had you in mind the idea of turning in these certificates and obtaining from the Realty Union some of its unimproved property?

A. If I could have gotten good unimproved property I would have taken it. But he told me not to, so I said "All right."

Q. What facts brought to your mind the advisability of turning in these certificates for unimproved property?

A. Well, if I could not get my interest, why then I



(Testimony of Hattie Hardesty Chapman.)

suppose I commenced to worry about it.

Q. But at that time it would have been of no importance to you where the unimproved property was located, so long as it was a desirable piece? Is not that true?

A. Well, I will tell you. I wanted to get this property back that I had sold them. That was what I was trying to do.

Q. Yes.

A. And I don't know. He said he was going to give me a mortgage on it.

Q. Was that the occasion that Mr. Aydelotte mentioned in his question to you, when the mortgage was mentioned?

A. I had so many questions asked me, I don't know.

Q. You answered me a little while ago, that if they had some unimproved real property that was desirable, you were of the mind to turn in your certificates for this property. Didn't you make such an answer?

A. Well, yes, if I could have found good property.

Q. If you could have found good property?

A. But I wanted to get this property back that I had sold them, because I thought they [68] could not have any better than that.

Q. But if they did have some that you thought was not quite so choice as that, and that was not as valuable, you would have been perfectly willing to accept it? Isn't that right?

A. If it was good property, yes.

Q. And you understood that your paper here gave

(Testimony of Hattie Hardesty Chapman.)

you the right to call upon them for a list of their property?

A. They sent me out word, I think, to that effect, didn't they?

Q. Well, you looked at your investment certificate, and you understood that your investment certificate entitled you to call upon them for a statement of their properties, and entitled you to exchange, if they had any for sale, didn't you?     A. Yes.

Q. When you did speak to him about this particular piece of property, this piece that you turned over to them, did you ask him whether that was among the properties which was available for exchange on the turning in of these certificates?

A. I think I did, and I believe he told me at the time that he wanted to hold that.

Q. Did you then state to him that you would like—or had you stated to him generally that you would like to have from him a statement of the properties that could be received in exchange for certificates?

A. I told my attorney to attend to that for me.

Q. Then you had told your attorney to go to Mr. Johnson and see if he could procure for you a list of the properties which the company was willing to exchange for certificates?     A. Yes.

Redirect Examination.

Mr. AYDELOTTE.—Q. State whether or not you took that action in response to the advice of your attorney.     A. What is that?

Q. State whether or not you asked them for those lists in response to advice from your attorney?

(Testimony of Hattie Hardesty Chapman.)

A. I did.

Q. I ask you as to whether or not you ever did get any such list, [69] or any list of properties from Mr. Johnson? A. No.

Q. I will ask you as to whether or not Mr. Johnson was asked by your attorney to furnish any list?

A. I asked my attorney about a half a dozen times if he had gotten the list yet.

Recross-examination.

Mr. CLARK.—Q. You think it was as many as half a dozen times that you enquired of your attorney whether he had obtained a list of properties from the Realty Union for the purpose of exchanging your certificates?

A. Yes.

Q. That is correct? A. Yes.

Q. You think, allowing that that is possible, that you asked your attorney a half a dozen times whether he had received a list of property from the Realty Union for exchange purposes, that you were in an attitude of mind that you were perfectly willing to turn in these certificates if you could receive property in exchange? Is that right?

A. If I could get good property, I would.

Q. That was your idea right from the outset, when you started in to talk about exchanging your certificates, wasn't it?

A. That if I could get good property, I would consider the matter of exchanging.

(Testimony of Hattie Hardesty Chapman.)

Redirect Examination.

Mr. AYDELOTTE.—Q. You noticed in that so-called certificate the provision in reference to the exchange for property, Miss Chapman?—you noticed that it did not specify any particular price at which they should offer you any property at?

A. No.

Q. You noted that?      A. Yes.

Q. And you noted, did you, that under that certificate the power of fixing the price of the property supposed to be exchanged, was left with the corporation?      A. Yes, sir. [70]

Recross-examination.

Mr. CLARK.—Q. Did you expect that if you turned these investment certificates in and received back the property, that the price of the property would be fixed by the corporation?

A. I don't understand exactly. I don't understand your meaning.

Q. Let me put this very clearly, then. You stated that you went to Mr. Johnson and you had in mind the getting back of this particular piece of property.

A. Yes.

Q. You have now answered counsel that you understand from the face of the certificate that the corporation would fix the price at which property would be exchanged for certificates. I call your attention to what he refers to. Maybe you didn't understand Mr. Aydelotte's question. This reads: "Any owner of investment certificates of a paid-up value of not less than \$100 may exchange them for unimproved



(Testimony of Hattie Hardesty Chapman.)

realty held for sale by the corporation.” You understood from that language in the certificate that the corporation, in exchanging property would fix some price on it, didn’t you?

A. Why yes, of course.

Q. You thought they would? A. Yes.

Q. Are you clear in that? A. Yes.

Q. Well, then, when you considered the matter of getting back the property, the property that you had deeded to them, you understood that if you took it back the corporation would fix the price on it?

A. Yes.

#### Redirect Examination.

Mr. AYDELOTTE.—Q. Did you, Miss Chapman, receive from Mr. Johnson or from any one else—

The REFEREE.—(Int.) I am not sure that the witness understood counsel’s last question. Counsel’s last question related to getting back the property that she had sold.

A. Yes. [71]

Q. That you sold to the Realty Company?

A. Yes.

Mr. CLARK.—You understood that my question related to the return of the property that you had turned over to them?

A. Yes.

(The last question and answer of the last cross-examination read.)

The WITNESS.—Yes, I meant that.

Mr. AYDELOTTE.—Q. Now, that there may be no mistake about this, let me put the question to you,

(Testimony of Hattie Hardesty Chapman.)

Miss Chapman: At the time you talked to Mr. Johnson about the possibility of exchanging or transferring some property for these certificates, or your claim against the corporation, was that not after default had occurred in the payment of interest to you?

A. Yes.

Q. And was that not after the matter had been placed with your attorney for adjustment?

A. Yes.

Mr. CLARK.—Now, your Honor, that there may be no question about this record, if counsel, in anything that has been said between this witness and Mr. Johnson will bring out the details showing that what was said related to a compromise, I have no objection. But I want to make our position clear, and that is, that we contend that there was not a single thing in any conversation between counsel and the Realty Union, between his own client and himself or between his client and the Realty Union that was indicative of anything more than an adjustment. But I have no objection to his introducing testimony that tends to show a compromise. But so far, it is just a plain, ordinary discussion of exchanging certificates for real property.

Mr. AYDELOTTE.—I will state for counsel's benefit that I intend to testify on that point, because I was the one that conducted the most of the negotiations with Mr. Johnson. And it was directly upon that point that I asked my question, and counsel objected and the objection was sustained. Because

(Testimony of Hattie Hardesty Chapman.)

my questions were all directed to the attempt to compromise this case. [72]

The REFEREE.—Q. In regard to the question which was read to you by the reporter you spoke of endeavoring to obtain a return to you of the property that you had sold to them.

A. Yes.

Q. You have also answered that you considered that they had a right to fix the price. Am I to understand that if the price that they fixed exceeded the amount that they were to pay you for the property, that you would have to agree to such price as they might fix for the property in order to obtain the return of it to you? Do you mean to answer that?

A. No, I thought—I just wanted to get my \$19,000.

Q. I want to know if you understand the question that was asked you. You have answered that you understood that they had a right to fix the price of the property in the event of a return to you of the property that you had sold.

A. Well, I tell you, I wanted to get this property back, and I asked Mr. Johnson if I could not get it back, and I thought I would get my attorney and he would arrange things for me—arrange the price.

The REFEREE.—It is perfectly clear that the witness does not understand what she has answered.

Recross-examination.

Mr. CLARK.—I think she does. I will ask her a question.

(Testimony of Hattie Hardesty Chapman.)

Q. Your counsel asked you this, Miss Chapman, whether in the event that the Realty Union traded back property for certificates—

The REFEREE.—(Int.) Her property. The question related to her own property.

Mr. CLARK.—I will lead up to it.

Q. You understood that if you traded your certificates for Realty Union property, that the Realty Union would fix the price on the property which it turned over for the certificates, didn't you? You understood that?

A. Well, I expected to get the property back. That was all. I expected to get the full value. I didn't [73] expect to get just part of the \$19,000.

Q. Well, now, let us make this very simple.

A. (Int.) I expected to get what I sold it for. That is all.

Q. Did you understand your counsel when you answered him in effect that you did understand that if these certificates were turned in for property, the Realty Union would fix the price on the property exchanged? Did you understand—

A. (Int.) I don't mean just this property now. I mean that which I sold them. I wanted to get a list of their property. They would naturally make out the prices that they would charge, wouldn't they? And then I would consider whether it was worth \$19,000. Supposing they had my piece of property and they said it was worth \$19,000. If I didn't think it was worth \$19,000 I would not consider it.

Q. You have now answered exactly as you did



(Testimony of Hattie Hardesty Chapman.)

answer your counsel, that if they fixed up a list—

The REFEREE.—(Int.) Her answer is perfectly clear as to that.

Mr. CLARK.—Q. Now then, you knew this, Miss Chapman, that if you in 1915, two or three years after you had sold this property, went to the Realty Union for the purpose of getting back the property that you had turned in to them, that they would likewise fix the price, fix some price upon that property at which they would exchange it to you for certificates, didn't you?

A. Well, I wanted to get the property back.

Mr. CLARK.—Mr. Reporter, please read the question. (Question read.)

A. Why, naturally they would put a price on the property. I thought that.

The REFEREE.—This question relates to the particular property that you sold.

Mr. CLARK.—Q. If that was bought back by you for your certificates you expected they would fix a price on it, didn't you?

A. Why, I expected to get back my price. [74]

Q. You stated to the court three or four times, Miss Chapman, that if the Realty Union furnished you with a list you expected it would fix prices on its property? A. Yes.

Q. And that you would take a piece of property if you thought the price was desirable? You understood that would apply?

A. I naturally would want to get the value of my

(Testimony of Hattie Hardesty Chapman.)

\$19,000. I would not want to take \$10,000 worth of property for \$19,000.

Q. Well, in the event of their turning back to you the piece of property that you had turned over to them, did you expect that they would fix the price upon it as a trading property? Did you expect that they would deal with that property just like any other property?

A. I thought they would give me back my property. Why shouldn't they?

Q. Yes. Did you expect they would give you back that property for which you claimed the price was \$35,000, for \$19,000 in certificates?

A. They would give the value of my money. Perhaps they could hold the mortgage on it. I didn't want them to give me \$35,000 on it when they had paid off this mortgage.

Q. Supposing this property had increased in value two fold and you had tendered the certificates to them in exchange for this property, would you have expected them to fix the price upon it?

A. What I wanted them to do was to give me a mortgage on it for \$19,000. That is what I wanted. Then they could sell it for what it was worth. If it was worth very much more they could take what they sold it for and give me my \$19,000. But I wanted a mortgage on that property, on that particular piece of property.

Q. Now, in the event that you traded your certificates for this particular piece of property did you expect that the Realty Union would fix the same

(Testimony of Hattie Hardesty Chapman.)

price upon it at which they had taken it from you?

A. That is the way I thought. I thought I would get it back or they would give me a mortgage. [75]

Q. Didn't you answer repeatedly that you enquired as to whether you could trade back for this particular piece of property?

A. I meant by that that I wanted to get a mortgage on it; get my claim on it that way.

Q. Had you been to see an attorney before you suggested getting a mortgage upon it? A. Yes.

Q. And had your attorney advised you that it would be feasible to get a mortgage upon it?

A. I think he had.

Q. Didn't your attorney tell you that there was not much use getting a mortgage on it if you had preferred vendor's lien?

A. Well we were trying to settle this thing up.

Q. Well, when you were talking about getting a mortgage on it, did you think at that time you had a vendor's lien on this property?

A. I don't think I knew about it, about a vendor's lien.

Q. You had been to see your attorney all this time and he had told you to go and demand a mortgage, hadn't he? A. I don't know.

Q. Do you now say that you didn't go to see your attorney and that that attorney didn't tell you to ask for a mortgage before you requested it?

A. I had been to see my attorney before, yes. I know I had.

Q. Do you now say that your attorney did advise you to get a mortgage?

(Testimony of Hattie Hardesty Chapman.)

A. I didn't ask him for a mortgage at that time. I said that I wanted to get my property back.

Q. Do you now say that your attorney did not advise you to ask for a mortgage?

A. No, my attorney did not do that.

Q. Did you ask Mr. Johnson for a mortgage?

A. No, I don't think I did, myself.

Q. Do you now say that you didn't ask Mr. Johnson for a mortgage?

A. I asked Mr. Johnson for this: if I could not get my property back; and he said he wanted to hold that property. [76]

Q. Now then, if you didn't mention the mortgage why was it that you were willing to take the property back in exchange for your certificates?

A. Why, if he had let me have the property I would have given him back the notes, naturally.

Q. Did you expect that he would ask for these certificates then if you did get this property back? Did you suggest that?

A. Why, I simply wanted to get the property back.

Q. Did you have in mind the turning in of these certificates if you did get your property back?

A. Yes, I asked him if he was going to pay me anything on this note.

Q. Did you have in mind the turning in of these certificates if you got the property back?

The REFEREE.—Yes, she said that she had in mind the turning in of the certificates if she got the property back.

Mr. CLARK.—Q. If these certificates were turned



(Testimony of Hattie Hardesty Chapman.)

in did you expect that the Realty Union would fix some price on this property?

Mr. AYDELOTTE.—I submit that the question has been answered.

A. I said that I expected to get my \$19,000 value out of the property, and I didn't expect to get any more than that.

Mr. CLARK.—Q. Then you did expect that the Realty Union would fix a price upon that property if it was turned back to you, didn't you?

A. I thought probably they would, but I didn't think anything about that. All I struck them for was, I wanted to get my \$19,000 out of it, and I considered that I should get that out of it, because the property was certainly that valuable.

Q. Did you expect them to return the whole of it to you?

A. I expected to get \$19,000 and I didn't want any more.

#### Redirect Examination.

Mr. AYDELOTTE.—Q. Is it not a fact, Miss Chapman, that at the time you had this talk with Mr. Johnson that Mr. Johnson had told [77] you there were some encumbrances on this property?

A. Yes.

Q. Did you expect Mr. Johnson to give you \$40,000 worth of property for \$19,000?

A. No, I did not.

Q. Isn't it a fact that you asked Mr. Johnson about getting this property back, having in mind the possibility of an amicable settlement of this whole business? A. Yes.

(Testimony of Hattie Hardesty Chapman.)

Q. Isn't it a fact that your answer to the former question with relation to fixing the price upon the property was with relation to your \$19,000, together with whatever mortgage there might be upon the property, and then making an adjustment of the whole thing?     A. Yes.

Recross-examination.

Mr. CLARK.—Q. In other words, if the property had gone up so that it was five times as valuable as it was before, you expected that the \$19,000 and the amount of the mortgages would be deducted from the value of the property, didn't you?

A. I expected only my \$19,000, because I sold to them for a certain amount and I didn't expect any more from them.

Q. You answered your counsel that you didn't expect \$40,000 for \$19,000?     A. Yes.

The REFEREE.—I think, counsel, that you will not accomplish any more by pursuing this line of examination.

Mr. CLARK.—Let me ask this question, finally:

Q. If the property had gone up so that it had become worth a hundred thousand dollars, you would not have expected the return of that property to you, for the certificates, would you?

A. I would have expected \$19,000 out of it.

Q. If it had been turned back you would have expected \$19,000 worth for it?

A. I would have expected \$19,000 and they would be entitled to the rest.     [78]

Q. Then you would have expected that the Realty

(Testimony of Hattie Hardesty Chapman.)

Union, in making its adjustment with you, would fix some price upon the property?

A. I don't see what that has to do with it. All I wanted was to get my money.

Mr. AYDELOTTE.—Q. Miss Chapman, is it a fact that these conversations with Mr. Johnson were before or after you consulted your attorney with reference to a possible compromise settlement of this whole matter?

A. They were after, I consulted my attorney.

**Testimony of W. M. Aydelotte, for Claimant.**

Testimony of W. M. AYDELOTTE, called for claimant, sworn.

The WITNESS.—I will state that as the attorney for Miss Chapman I made at least a half dozen trips to the office of the Realty Union and had conversations with Mr. Johnson relative to a compromise settlement of this whole affair, so as to avoid any litigation or entanglement. Mr. Johnson himself proposed to me, or made the proposition that we accept a note and mortgage due in three years, on this identical property. He claimed the property was worth more—was worth some fifty or sixty thousand dollars. I said, "Will you let me have some lists of those various properties which you have for sale?" And I says, "I will look over those lists and if anything appears to be right, and we can in that way effect an amicable adjustment of this matter which is satisfactory to Miss Chapman, we will see what can be done"; that I would much rather have the whole thing adjusted that way than to

(Testimony of W. M. Aydelotte.)

have it strung out in a lawsuit. The interest was past due, and I demanded the interest but it was not forthcoming. Mr. Johnson told me the condition of the affairs of the corporation, and told me very frankly that they were in a bad way. And we had several meetings. One meeting we had in my office when Mr. Grace was present, at which the proposition of the mortgage [79] was discussed, and he told me the mortgage was on these two pieces of property, not on the one piece described in the complaint. And then coming to those conversations, and the counter propositions for a compromise settlement, on the 10th day of May or the 11th day of May, and a year ago last May I filed my suit on behalf of Miss Chapman to declare a vendor's lien on this property. All of the requests for lists of property were made at my suggestion, and with a view to a compromise of this situation. Any questions, Mr. Clark?

Mr. CLARK.—Q. Have you any memorandum of when Miss Chapman first came to you?

A. Why, I think, Mr. Clark, it was along about the first of March; somewhere in there. It seems that it was either shortly before or after the first of March. I see by the date of this letter of March 15th with reference to the statement that the payments would be withheld. It is either before or after that date.

Q. When you asked Mr. Johnson for a list of this property what made you think you were entitled to ask for a list?



(Testimony of W. M. Aydelotte.)

A. I recognized and thought at the time that there would be no reason for asking for lists by virtue of any right; that that particular clause in the certificate didn't amount to anything, because it was not a right which we could exercise. It was a right which the corporation could exercise at its own pleasure and profit, but it was of no value to the promissory note holders.

Q. Did you tell your client that before you went over and demanded a list?

A. I don't know whether I did or not. I know that I had never explained the situation fully to my client.

Q. Had you read that particular clause in the investment certificate before you went over and demanded a list?

A. I certainly had.

Q. How many times?

A. Maybe two or three times.

Q. Was it because of that provision in the investment certificate [80] that you did go over and demand a list?

A. No, not any more than if you had owed me a thousand dollars and could not pay me, I might have gone to you for some of your property to meet the indebtedness.

Q. Did you ever make the suggestion to Mr. Johnson that the document on its face said that you had a right to exchange it for real property of this company that might be held for sale ?

(Testimony of W. M. Aydelotte.)

A. Yes, I made such a suggestion to Mr. Johnson, with this coupled to it, that the right didn't amount to a hill of beans, because the company had it in its power at all times to fix the price of the property.

Q. When you asked for a list did you tell the company that you would like to have a list of property, and to have them specify the prices that might be put upon it, or the prices that it might be held at?

A. Yes, and I told him to make the prices the best he could, because of the accrued interest that was due to Miss Chapman, and I wanted to favor her all I could.

Q. Well, at the time of these several conversations did you or your client, Miss Chapman, demand any lists?

A. I never demanded any lists.

Q. When you asked for a list you asked for prices?

A. I expected that they would give me prices.

Q. Did you as an attorney consider at that time the compromising of this case, or of this lady's claim, without making a demand of that sort? You had a list of these properties held for sale. Would you have called it compromising the case if you had traded off \$19,000 in certificates for property held at \$19,000? A. Yes.

Q. In what way would such a deal have departed, in your judgment, from the language of the investment certificate?

A. I will tell you why. Because Miss Chapman had the right absolutely to rely upon [81] the promise to pay the \$19,000 in money. She was not

(Testimony of W. M. Aydelotte.)

obligated to take one single piece of property; and the surrender of this promissory note, or of this claim, against the corporation for \$19,000 in property, and the taking of any property for it, or the taking of anything except money, would be a compromise of the case.

Q. Even though it had been exercised in accordance with the terms of the investment certificate?

A. Yes, sir; because that was merely a method suggested to discharge the obligation. And that method exists independent of any contract.

Q. Would you say that it existed independent of any contract if at any time the Realty Union had held for sale, in accordance with the terms of its contract, lists of property?      A. Yes, sir.

Q. As an attorney at law were you not familiar with the fact that specific performance of a contract can be enforced even though the right to enforce specific performance depends upon the selection of a particular piece of property by a person claiming to have a right to have a specific performance?

A. That may be, but still, when the price of the property is left to arbitrary discretion of the owner, the one who holds it, it looks to me a bait to get somebody to buy these promissory notes without any value whatever.

Q. Don't you know that the rule is that specific performance of a contract must receive a fair construction, and that no Court would ever sanction the fixing of an arbitrary price, as you call it, at an exorbitant figure, in the event that you had gone to

(Testimony of W. M. Aydelotte.)

court on a suit for specific performance?

A. That is true, to a certain extent. But the Court will also assume that an arbitrary price will be fixed.

Q. When you went in there you say you went in by the authorization of your client. Didn't you find that you were making a demand that you were entitled to make under the strict terms of the investment [82] certificate, when you were asking for a list of property?

A. I say I told Mr. Johnson that that particular provision in there didn't amount to a hill of beans, in my opinion, and that is my opinion still.

(Further hearing adjourned to Wednesday, April 5, 1916, at 1 P. M.)

Wednesday, April 5, 1916, 1 P. M.

ARMAND B. KREFT, Referee in Bankruptcy,  
Presiding.

APPEARANCES:

WM. M. AYDELOTTE, Esq., Attorney for Claimant.

GEORGE CLARK, Esq., and A. H. BRANDT, Esq.,  
Attorneys for Trustee.

**Testimony of Hattie Hardesty Chapman (Resumed  
Cross-examination).**

Cross-examination of HATTIE HARDESTY  
CHAPMAN (Resumed).

Mr. BRANDT.—Q. Miss Chapman, the other day you said in the course of your examination that there was some friend with whom you advised with ref-



(Testimony of Hattie Hardesty Chapman.)

erence to this transaction with the Realty Union. That was true, wasn't it?

A. Yes.

Q. Was that individual William C. Wallace?

Mr. AYDELOTTE.—We object, if the Court please.

A. Must I tell his name?

The REFEREE.—Do you intend to call the party as a witness in the case?

Mr. BRANDT.—Possibly. I will connect it anyway.

Mr. AYDELOTTE.—I can't see the materiality.

The REFEREE.—It may be material. There is possibly a question of intent here, which may make it material as showing the extent of the witness' knowledge as to the so-called investment certificates of the Realty Union. The issue presented here seems to be as to whether or not this was simply taken as evidence of payment, or promise to [83] pay rather, the purchase price, whether, from the trustee's standpoint it was an investment in their investment certificates. In that view her knowledge concerning the Realty Union may be important. I overrule the objection. A. Yes.

Mr. BRANDT.—Q. Did he act in your behalf in negotiations with the Realty Union?

Mr. AYDELOTTE.—I cannot think that that is material. It is calling for an opinion.

The REFEREE.—Overruled. You may answer that yes or no.

Mr. BRANDT.—I withdraw the question and will

(Testimony of Hattie Hardesty Chapman.)

put it in this way: Did Mr. Wallace see the Realty Union for you with reference to the sale of this property?

A. Well, he told me that they wanted to buy a lot of land, and he asked me if I wanted to sell to them.

Q. Did he do anything further in reference to the matter than that?

A. No, I can't say that he did anything further. I thought that over, and then I said yes, I would sell it to them.

Q. Do you recollect who arranged the sale to the Realty Union?

A. Well, he told me the price they were willing to pay me.

Q. Had he gone to them? Had you advised with him first, before he took it up with the Realty Union?

A. No, but he simply told me that he knew I had this land, and if I could find a purchaser I would sell it, and he told me about the Realty Union, saying that they would buy it from me.

Q. The first time that he spoke to you with reference to the matter, did he state the price at that time, or were there any subsequent negotiations?

A. I don't remember exactly. I think probably he asked me—

Mr. AYDELOTTE.—We object to probabilities. Anything that was done, but not probabilities. [84]

The REFEREE.—The witness is volunteering a statement.

A. Well, he asked me if I wanted to sell to them, and I don't remember whether it was then, whether I

(Testimony of Hattie Hardesty Chapman.)

told him to find out how much they would give. I have really forgotten that.

Q. Do you recall going to some office of the Realty Union and closing the sale?

A. I didn't go—I don't think I went up—I can't remember. What is the question?

Q. Do you remember going to the office of the Realty Union with Mr. Wallace before the settlement? A. No, I don't think I did.

Q. Where were the certificates of stock delivered to you?

Mr. AYDELOTTE.—We object. There were no certificates of stock.

Mr. BRANDT.—I beg pardon. Investment certificates. Where were they delivered to you?

A. Why, I got them up to Mr. Johnson's office.

Q. They were taken up to Mr. Johnson's office, and you were up to Mr. Johnson's office?

A. I was up there the day I got them, certainly.

Q. At the time did you talk to Mr. Johnson with reference to the affairs of the company and the condition of the company and the character of these investment certificates?

A. Well, I told him—I don't know. We had a talk.

Q. How long was the conversation? Do you recollect?

A. I had known Mr. Johnson a long time. We stayed up talking a long while, but I guess it was not all about the Realty Union. I naturally told him I guessed it was all right. I asked him if I could not

(Testimony of Hattie Hardesty Chapman.)

get my money before ten years. He said no, I could not do that. I told him I hated to wait that long.

Q. Miss Chapman, at that time did you read the certificates?

A. If I remember correctly, I think Mr. Johnson read them over to me.

Q. You think he read them over to you at that time? A. I think he did. [85]

Q. Did you make any inquiries at that time of Mr. Johnson about the company and its affairs?

A. No, I don't think I did, because I had thought about the matter and I knew that they were all good, reliable men. I knew Mr. Johnson. I had known him for a long time. I knew he had a fine reputation. And Mr. Woodworth had a splendid reputation. He was at the head of the company; so I don't think I said anything more about it, because I thought it was all right.

Q. Had Mr. Johnson advised you to proceed and close the matter, close the transaction, prior to that time?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial.

The REFEREE.—I don't see the materiality.

Mr. BRANDT.—Very well, then. What was the occasion of your going into the office of the Realty Union at that time?

A. I went up to get my note from them, that they were going to pay me; also to finish up the deal with them.



(Testimony of Hattie Hardesty Chapman.)

Q. The deal had not been finished up to that time? It hadn't been closed?

A. No, that was the day it was closed.

Q. That was the day the deal was closed, and you had a conversation then with Mr. Johnson before the deal was closed? Is that correct?

A. Well, we were just talking there during the time he was getting the notes ready, and this man, if I remember correctly, signed the notes in another room, and then Mr. Johnson signed it there. I think he signed it in the room I was in, and we just talked about it.

Q. Did you sign a deed to the property?

A. I think I did.

Q. Do you recollect to whom the deed ran?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial. [86]

The REFEREE.—The question is whether she recollects. She may answer the question.

A. I don't know. I didn't think anything about that, because I was selling to the Realty Union, and I didn't think how it read. Probably I didn't notice that particularly.

Mr. BRANDT.—Mr. Aydelotte, will you stipulate that the deed was made to Mr. Johnson?

Mr. AYDELOTTE.—I would rather have the deed produced. On the other hand, if any deed is offered in evidence, why, it does not make any difference, because the answer of the Realty Union admits the conveyance. That is an admitted fact in this case,

(Testimony of Hattie Hardesty Chapman.)

and it does not make any difference how many mesne conveyances were made.

Mr. BRANDT.—I think it might have some materiality.

Mr. AYDELOTTE.—With the suggestion of counsel that he amend his answer, it might be material. It is not an issue in this case now.

Mr. BRANDT.—Q. Miss Chapman, did you ever employ an attorney prior to the time that these negotiations were closed, to enquire into the affairs of the company for you?

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—Overruled.

A. No.

Mr. BRANDT.—You had never employed an attorney at that time to enquire into the affairs of the company for you?

A. No.

Q. The only person who represented you, if anybody represented you, was Mr. Wallace? Is that right?

The REFEREE.—She has not testified that he represented her.

Mr. BRANDT.—I withdraw the question.

Q. When did you first employ Mr. Aydelotte in the case?

A. I can't remember just what month it was. I could not get my interest, so I thought I had better tell my troubles to somebody.

Q. That was subsequent to the closing of this

(Testimony of Hattie Hardesty Chapman.)

transaction? Subsequent to the closing of the sale?

A. Long subsequent to that.

Q. How long subsequent to that did you employ Mr. Aydelotte? [87]

A. Just the beginning of last year.

Q. At this time you recollect no attorney that you at that time employed and requested to look up the affairs of the company for you? A. No, sir.

Q. I understand you to say that Mr. Johnson read the certificates to you?

A. I am quite sure he did, if I remember I think he read them to me.

Q. Did he tell you at that time about the affairs of the company? Did he tell you at that time whether certificates of the character which he was reading to you were the kind that were generally issued by the Realty Union?

A. No, he didn't say anything about that.

Q. Did he tell you how many of those certificates were outstanding? A. No.

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—The question has been answered.

Q. Did you know at that time how many certificates of this kind had been issued to other people?

Mr. AYDELOTTE.—We object upon the ground that it is immaterial.

The REFEREE.—The objection is overruled.

A. I didn't think anything about it.

Mr. BRANDT.—Q. Did you know at that time,

(Testimony of Hattie Hardesty Chapman.)

referring to the time that you were closing the transaction with Mr. Johnson, that there were other properties that were being conveyed to the Realty Union beside the pieces that you were conveying to him or to the Realty Union?

A. I understood that there was.

Q. Did you understand also, Miss Chapman, that there were other certificates outstanding, also?

A. Well, I didn't think anything about it.

Q. When Mr. Johnson read the certificates to you did you consider them promissory notes, simply?

[88]

Mr. AYDELOTTE.—We object upon the ground that it is incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled. The witness has referred to them throughout as notes.

A. Well, what they meant to me was that the Realty Union was going to pay me \$19,000 with interest in ten years. They were going to pay me this \$19,000 and my interest every month.

Mr. BRANDT.—Q. Was the fact that there was a provision on the certificates or in the certificates providing that they could be exchanged at their face value for property of the Realty Union, an element that you took into consideration in closing the transaction?

A. I didn't think anything about that. Because if I had wanted any property I would have kept what I had. I simply wanted to get the money out of them.



(Testimony of Hattie Hardesty Chapman.)

Q. The property that you had at that time, Miss Chapman, was encumbered by mortgages, was it not?

A. Yes.

Q. The other day you stated that you didn't recollect whether there had been any suit for foreclosure under mortgage, or any threatened suit for foreclosure. Is that your present recollection?

A. Well, I don't remember about that.

Q. Do you know who had the mortgage on the 153 feet from the corner?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial. If there was a mortgage the record speaks for itself.

The REFEREE.—What is the purpose?

Mr. BRANDT.—Well, she said she would keep the property. I think it may be material, showing the reason she conveyed for the certificates.

The REFEREE.—The objection is overruled. Answer the question.

A. No, I don't remember.

Mr. BRANDT.—Q. And I understand also that you have no recollection [89] of any transaction with Mr. Whitehead with reference to that piece of property?

A. No, I have forgotten that.

Q. Your present recollection is, then, that there was no particular reason why you should sell the property except the reason that you got a fair price for it. Is that it? A. That is true.

Q. There was nothing in the nature of the encum-

(Testimony of Hattie Hardesty Chapman.)

branches on the property that made a sale pressing or urgent?     A. No.

Mr. BRANDT.—I think that is all.

Mr. AYDELOTTE.—No questions.

**Testimony of Roosevelt Johnson, for Trustee.**

Testimony of ROOSEVELT JOHNSON, called for trustee, sworn.

Mr. BRANDT.—Q. Mr. Johnson, you are an officer of the Realty Union?

A. Yes, sir; I was.

Q. What position did you hold?

A. Vice-president and manager.

Q. Were you vice-president and manager in 1912?

A. Yes, sir.

Q. Do you know Miss Chapman, who was just on the stand?     A. Yes, sir.

Q. Do you recall at this time the transaction with reference to the purchase of the property at Twenty-fifth and Telegraph?     A. I do.

Q. Who first spoke to you with reference to that transaction, Mr. Johnson?     A. Mr. Wallace.

Q. What is his first name?

A. William C. Wallace.

Q. What if anything did he say to you with reference to the property?

Mr. AYDELOTTE.—We object to that as irrelevant, incompetent and immaterial, calling for conversation outside of the *present* of the parties, and is not binding on Miss Chapman. He can state what he did or what action was taken; but not the conversation.

(Testimony of Roosevelt Johnson.)

The REFEREE.—The objection is sustained.

Mr. BRANDT.—Q. What did Mr. Wallace do with reference to the property, if anything, with the Realty Union? [90]

A. Mr. Wallace represented to me that—

Mr. AYDELOTTE.—I object to what he represented to him. That has nothing to do with this case.

A. I can answer that without giving his representations. Mr. Wallace arranged with Mr. Whitehead to take up the mortgages which had been foreclosed on the inside piece of property, 159 feet. The sale was about to be had. He arranged with Mr. Whitehead to pay off those mortgages. There were two mortgages. Whitehead, I believe, had bought the second one at a discount, and had paid the first and had made a fresh loan from the Savings Union to cover the ground, and agreed with Mr. Wallace for the account of Miss Chapman to hold that property for thirty days for the sake of a bonus that they agreed to pay him, and at the end of thirty days to turn it over to him or to keep it for them. But they didn't succeed in selling it during these thirty days. That was on the 159 foot piece of property, the inside property. The deed was made from Caro Mills to Mr. Whitehead because his name was used in the transaction. Then Mr. Wallace arranged with me to buy the corner at a certain price and to take up from Mr. Whitehead the inside piece. The corner I found had three mortgages on it, and I believe there were a lot of delinquent taxes on it, and we bought

(Testimony of Roosevelt Johnson.)

the whole piece, taking the inside property from Whitehead and taking up the corner, and I paid Mr. Dinkelspeil a second mortgage on the corner. I paid the Oakland Bank,—the City Bank of Oakland, is it? or something like that—I have forgotten the name—some \$2,400, being \$2,000 on the property, and interest and taxes, and paid Mr. Wallace for account of Miss Chapman, \$750, approximately, in cash. There was some balance to the transaction. It amounted to approximately that sum. Mr. Wallace intimated to me that he had acted—

Mr. AYDELOTTE.—(Int.) Don't state what Mr. Wallace intimated.

The REFEREE.—Just state what was said and done. [91]

The WITNESS.—I believe Mr. Wallace had an equitable interest in the corner.

Mr. AYDELOTTE.—I object to what the witness believes.

The REFEREE.—It will go out. Just state what was done about the acquisition of this property.

A. We made those payments and we assumed the \$5,000 mortgage to the Union Savings Bank and the \$2,000 to the Oakland City Bank, which was subsequently paid. We gave Miss Chapman \$19,000, in investment certificates and made a payment in cash of approximately \$750. I have forgotten the exact amount. Those negotiations were all had through Mr. Wallace, and he and Miss Chapman closed the transaction together in my office.

Mr. BRANDT.—Q. Did you acquaint Miss Chap-



(Testimony of Roosevelt Johnson.)

man as to the affairs of the Realty Union?

A. I acquainted Miss Chapman and also Mr. Wallace. He was directly familiar with the affairs of the company. He was an officer of the Realty Syndicate for some time. I showed him a financial statement of the company, showing the amount of obligations and the character of the obligations; the amount of the assets and the character of the assets, the character of the property. I gave all that information to Miss Chapman and to Mr. Wallace. One of the arguments I used generally in showing the character of the business of the Realty Union is to show—

Mr. AYDELOTTE.—(Int.) Did you make that argument to Miss Chapman?

A. Yes. I showed her that in one case she owns a specific piece of property which may not increase in value, but when she takes a certificate she has an interest in all our properties, scattered over a large district, therefore there is a large chance for an increase in the value, because if one piece does not increase another piece will. Miss Chapman was familiar at that time with the fact that the Realty Union owned a great many properties, for I showed to her that our holdings covered a large distribution.

[92]

Mr. BRANDT.—Q. Now, Mr. Johnson, when was this conversation with Miss Chapman? Do you recollect?

Mr. AYDELOTTE.—What conversation?

Mr. BRANDT.—That he has just testified to.

(Testimony of Roosevelt Johnson.)

A. At the time of the closing of the transaction, which was in 1912, some time.

Q. Who were present at the office at the time?

A. Myself; I think Mr. Wallace was there, and Miss Chapman, and very probably Mr. Woodworth. I am not sure of that. He was sitting there most of the time.

Q. At that time had the transaction been closed?

A. I am speaking now of the closing of the transaction; the exchanging of the papers. The transaction was settled on prior to that. When we came to exchange the papers is the period I am speaking of now.

Q. Is that the occasion on which you stated you told Miss Chapman about the affairs of the company and its assets and liabilities and properties, *et cetera*?

A. I believe that to be the occasion. If it were not, then it was prior to that; because I know I had that conversation with her before closing the transaction.

Q. Did she read the certificates?

A. I don't believe she took them in her hands and read them, but I remember reading them to her, because I always read certificates to persons before I delivered them.

Q. Immediately after the conversation you delivered the certificates to her?     A. Yes.

Q. And she accepted them?     A. Yes.

Q. Now, Mr. Johnson, did anybody else call on you with reference to the property at Forty-fifth and

(Testimony of Roosevelt Johnson.)

Telegraph before the transaction with Miss Chapman was closed?

Mr. AYDELOTTE.—We object to that as immaterial. No connection has been made.

The REFEREE.—The objection is overruled. The question is preliminary. [93]

A. An attorney from the Chronicle Building called on me, saying that he—

Mr. AYDELOTTE.—Just a moment. I object to that as incompetent, irrelevant and immaterial. (Question read.)

The REFEREE.—Answer yes or no.

A. I don't know.

Mr. BRANDT.—Q. Did anybody call on you representing or stating that he represented Miss Chapman?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled.

A. No, that was not exactly the statement that he made.

Mr. BRANDT.—Q. Explain your answer.

A. In my opinion he did.

Mr. AYDELOTTE.—I move that that be stricken out. It don't make any difference what the witness' opinion is.

The REFEREE.—Strike it out.

Mr. BRANDT.—Q. Just explain your answer.

Mr. AYDELOTTE.—Explain what? There is no question to answer now.

The REFEREE.—Explain your answer.

(Testimony of Roosevelt Johnson.)

A. An attorney called on me, stating that he represented a client that owned property on Telegraph and Forty-fifth. I understood that he was negotiating for a piece belonging to Mr. Wallace's sister, and my information was that he represented Mr. Wallace's sister, but afterwards I took it for granted that he represented Miss Chapman.

Mr. AYDELOTTE.—I move that that be stricken out.

Mr. BRANDT.—I have no objection.

The REFEREE.—It may go out.

Mr. BRANDT.—Q. Now, Mr. Johnson, at the time that the transaction for the purchase of this Telegraph Avenue property was closed, [94] approximately how much in investment certificates of the Realty Union was outstanding?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial, whether it is one or one thousand, so far as Miss Chapman is concerned. It has nothing to do with the case.

The REFEREE.—The objection is sustained, unless you can bring the knowledge home to Miss Chapman.

Mr. BRANDT.—Q. During your conversation with Miss Chapman, Mr. Johnson, did you state to her anything with reference to the amount of certificates outstanding, of the company?

A. We issued a comprehensive statement which showed the exact amount outstanding, semi-annually. At that time the amount was \$600,000, probably.



(Testimony of Roosevelt Johnson.)

Q. You say you showed that statement to her?

A. Yes, sir.

Q. And the amount you think was about \$600,000 at that time?     A. I think at least that.

Q. Did you state to her at that time anything with reference to the property owned at that time by The Realty Union?

A. Oh, I described the property and pointed out its location, yes, sir, and the number of front feet.

Q. Did Miss Chapman ask you any questions with reference to the certificates at that time, do you recollect?

A. Only to know how short a term she could get.

Q. And what she wanted to know was the shortest term she could get? Do you recollect what you told her?     A. Yes, I told her ten years.

Q. And the certificates when written, were written for ten years?     A. Yes.

Q. Were the properties that The Realty Union had at that time for sale?

A. Yes, they were for sale.

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—Overruled. The question is answered.

Mr. BRANDT.—Q. Those properties were subject to the exchange provision [95] of the outstanding certificates?

Mr. AYDELOTTE.—We object to that as calling for the opinion of the witness, and not being an issue

(Testimony of Roosevelt Johnson.)

involved in the pleadings; immaterial and incompetent.

The REFEREE.—The objection is overruled.

A. Yes.

Mr. BRANDT.—Q. Do you recollect an occasion when Mr. Aydelotte, here, called on you to represent Miss Chapman?     A. Yes.

Q. What did he state to you at that time?

A. He asked me for a list of properties, with the prices.

Q. For the prices and for a list of properties?

A. The prices and a list of properties, so that he could make a selection, so if he wanted to turn in the certificates he could do so.

Q. Did he state that he represented Miss Chapman?     A. Yes, I think so.

Q. He referred to her? Is that correct? He referred to her certificates?

Mr. AYDELOTTE.—We object to that as leading.

Mr. BRANDT.—I will change the question.

Q. What did you do with reference to that request?

A. I told him it would be granted as soon as I had the prices for the properties; as soon as we had the prices for the land. As soon as the board had put prices on the land.

Q. Did the board subsequently meet?     A. Yes.

Q. And were prices put on the land?     A. Yes.

Q. Were the prices as fixed, a list of the prices fixed, given to Mr. Aydelotte?

A. I can't recollect. I believe so.

(Testimony of Roosevelt Johnson.)

Q. At any of the times that Mr. Aydelotte called on you was any mention made by him of a vendor's lien in favor of Miss Chapman's property on the corner of Forty-fifth and Telegraph? A. No.

Q. What was the first time that you heard of a claim of vendor's [96] lien on the property?

A. When I read the record in the paper; the record filed in the claim.

Q. You mean the filing of the suit? A. Yes.

Q. Of Miss Chapman against The Realty Union?

A. Yes.

Q. Was any specific claim made by Miss Chapman or anybody in her behalf to you for this Forty-fifth and Telegraph property? A. No.

Q. Do you know where Mr. Wallace is now?

A. Living in Oakland. He gets his mail at 721 First National Bank Building. I don't know his Oakland address. Around Forty-eighth and Telegraph, I think.

#### Cross-examination.

Mr. AYDELOTTE.—Q. Mr. Johnson, do you say you gave me a list of those properties?

A. No, sir; I said that I would furnish you with a list of the properties. You were insistent on getting a list. There were lists furnished to anybody that asked for them. I said that I would furnish you with a list of the property and the prices as soon as they were out.

Q. Why do you think that you furnished me with a list?

A. Because you were applying for it. I naturally

(Testimony of Roosevelt Johnson.)

furnished them to the ones applying for them.

Q. You won't say, however, that you did give me a list?

A. No, I don't remember handing you one myself.

Q. Did anyone belonging to the company ever inform you that they had given me such a list?

A. I think not.

Q. Don't you know, as a matter of fact, Mr. Johnson, that I never was furnished with such a list? Don't you know of your own personal knowledge, that I never was furnished with any such list?

A. No, because my instructions would be to furnish you with a list if you asked for one; to furnish everybody with a list that asked for one. We would give them to anyone that asked for one. We would give them to any real estate agent. [97]

Q. Was the occasion when I asked you for a list, before the suit was filed?

A. You filed the suit before I had the list prepared. I know you didn't get it before the suit was filed, because it wasn't ready then.

Q. Do you know what date I filed the suit for Miss Chapman? A. No.

Q. I will refresh your recollection a little, Mr. Johnson. I will call your attention to a fact which I think counsel will admit, that the suit was filed the 11th day of May, 1915. Is that right?

Mr. BRANDT.—I presume it is so if you state so, Mr. Aydelotte.

A. Then I will have to correct my testimony, if you will permit me, your Honor, because the list



(Testimony of Roosevelt Johnson.)

was prepared before that. Although the list may not have included that particular property before that. When we prepared the list I excluded certain pieces which we proposed to hold permanently for an increased value. One was the corner on Telegraph and Forty-fifth; one was a gore piece and one was a piece on Broadway between 20th and 22d. We expected to hold those, but subsequently, however, we had very high offers for them and we sold them, sold the Broadway piece, and we sold the other two pieces, but we could not deliver them because you had filed your lien at that time and had tied up the property. You had filed your lien and tied up the property and somebody else filed an attachment and had tied up the gore property, so we never delivered them.

Q. You say a deed was made for those Chapman pieces?     A. Yes.

Q. Was that deed made to the California United Farms Company?     A. Yes.

Q. Since you have refreshed your memory, Mr. Johnson, and you now state that the list was made before I filed the suit, I will ask you to state when you made up the list of these properties for sale?

A. I believe it was approximately April 15th.

Q. I don't wish to take any advantage of you, Mr. Johnson, and I will ask the Court if I may see the exhibits, the letters.     [98]

A. It can very easily be verified from the date of the first sale, because the sales were waiting for the list to be made up. The date of the deed in the mat-

(Testimony of Roosevelt Johnson.)

ter of our first sale would evidence the date of the passing of the schedule. The schedules were all included in the minutes, too. The minute-book will show when the schedules were made.

Q. You say that your best recollection is that it was about April 15th that these lists were prepared?

A. Yes.

Q. I will ask you if that is your signature to that letter, Mr. Johnson?

A. Yes, that is my signature.

Q. I will ask you to look at the date of that letter. Is that correct?

A. Yes, March 15th. I don't know anything about that, but the date is there.

Q. Did you sign that letter? A. Yes.

Q. I ask you whether it was before or after March 15th, if you can recollect, that I called on you and ask you for this list of properties?

A. I can't recollect. I believe it to be after that.

Q. You think it would be after this? A. Yes.

Q. Do you know when any lists were made out?

A. The minute-book will show that; the dates of the schedules. They are all passed through the board.

Mr. BRANDT.—I will bring the minute-book and fix the date exactly.

The WITNESS.—I will refer to the minute-book and correct any failing in my memory to-morrow.

Mr. AYDELOTTE.—Q. Do you remember the conversation when I first called on you, Mr. Johnson, with reference to this property? A. Yes.

(Testimony of Roosevelt Johnson.)

Q. Is that the conversation that you say I asked for a list of properties and the prices, and said that I wanted to exchange some certificates for them?

A. I don't know that that was the first conversation we had. [99]

Q. Will you kindly repeat that conversation?

A. No.

Q. As near as you can?

A. I would not undertake to do it.

Q. Give the sum and substance of it.

A. I could not do that on the first conversation. The second was not anything about—we conversed about different subjects; the sum and substance of your purpose in calling, as far as I can recollect, was to get for Miss Chapman something more definite as security, than the certificates. That was your purpose in calling. You asked for a list. You asked for land which was not encumbered, and I told you that if you would wait until we could make a good sale we could pay off these mortgages and then I would give you clear land.

Q. Did I ask for any particular land?

A. No, I think not.

Q. Then how do you mean that I asked for land which was not encumbered?

A. It was all encumbered.

Q. I asked for a list of land of various sizes and different prices?

A. Yes, you had specified one piece which would make up, I think, part of the \$19,000, and then you

(Testimony of Roosevelt Johnson.)

asked for two pieces which would make up the \$19,000.

Q. In other words, one list of property for \$10,000 and another list for \$9,000 and another list of property for \$19,000? Is that correct?

A. Along those lines, yes.

Q. What did I state to you with reference to the reason why I asked for such lists?

A. I don't recollect that. I don't know why you asked me. I don't know now. I may have known then.

Q. Did I give any reason for asking for the lists?

A. I don't know.

Q. Did I not ask you for a statement of the condition of the company? A. I don't know.

Q. Did you give me a statement of the condition of the company? A. I believe so. [100]

Q. Did you voluntarily give it without my asking for it?

A. I believe so. That was our regular custom.

Q. Do you remember what kind of a statement that was that you gave me?

A. That was a printed statement; a printed statement that we had published probably prior to your calling.

Q. It was the 1914 statement; December 31, 1914?

A. I presume so.

Q. I will ask you if that is the statement. (Showing.)

A. That was our statement published under date of December 31, 1914. No doubt it was the one fur-



(Testimony of Roosevelt Johnson.)

nished you at that time.

Q. I ask you if it is not a fact, Mr. Johnson, that at that time I told you that I understood that you and Miss Chapman had been good friends in the past, and that I didn't want any lawsuit about the matter; that your company was in arrears for interest and that I wanted a fair deal, or words to that effect, and that I didn't want any suit, and that if we could possibly settle this matter without a suit in any way that would be fair to Miss Chapman, I desired to do so? In other words, generally was not that the effect of my conversation?

A. Yes, that is what you said.

Q. Was there more than one conversation, Mr. Johnson?      A. Yes.

Q. Were there any conversations in my office?

A. Yes.

Q. When? Before or after the suit was filed?

A. After.

Q. After the suit was filed?      A. Yes.

Q. What was said in those conversations bearing upon this same matter?

Mr. BRANDT.—We object to that as immaterial.

The REFEREE.—The objection is overruled.

A. I think nothing was said bearing on this matter. I discussed with you the value of the vendor's lien and you showed me the code provisions. I think that was the subject I took up with you at [101] that time. I believe you offered to release the vendor's lien if I gave a mortgage on the property for the amount of the certificates which our

(Testimony of Roosevelt Johnson.)

board was unwilling to do.

Q. Did that suggestion come from me or from you?    A. I don't know.

Q. Isn't it a fact that that proposition came from you, Mr. Johnson?    A. I don't know.

Q. And that proposition came after the suit was filed?

A. It came after the suit was filed; yes.

Q. Was there any talk like that before the suit was filed?    A. I think not.

(Further hearing adjourned to Thursday, April 13, 1916, at 2 P. M.)

Thursday, April 13, 1916, 2 P. M.

ARMAND B. KREFT, Referee in Bankruptcy,  
Presiding.

APPEARANCES:

GEORGE CLARK, Esq., and A. H. BRANDT,  
Esq., Attorneys for Trustee.

WILLIAM M. AYDELOTTE, Esq., Attorney for  
Claimant.

**Testimony of William C. Wallace, for Trustee.**

Testimony of WILLIAM C. WALLACE, called  
for trustee, sworn.

Mr. BRANDT.—Q. Where do you reside, Mr. Wallace?    A. In Oakland.

Q. Do you know the claimant, Miss Chapman?

A. I do.

Q. Do you know Mr. Johnson of the Realty Union?    A. Yes, sir.

Q. Did you at any time, Mr. Wallace, conduct any

(Testimony of William C. Wallace.)

negotiations with the Realty Union with reference to the sale of property at 45th and Telegraph?

A. I did.

Q. Will you kindly state the circumstances under which you conducted those negotiations?

A. Do you mean the immediate circumstances, [102] or the antecedents? How far back shall I go?

Q. Explain all the circumstances.

A. Well, the reason that I was connected with the transaction primarily was because the property was originally mine, and I had transferred it in two parcels. The greater part belonged to Miss Chapman and I still retained a portion, a segregated portion. That property had been for a long time under mortgage—in fact, parts of two mortgages and a deed of trust, for moneys which had been borrowed by me and which had been owing by me, and for which Miss Chapman had received no benefit; consequently I felt that it was incumbent on me to do whatever was necessary to protect the property in connection with the mortgages. While I was absent from the state the holder of the deed of trust, Mrs. Gardner of Oakland, whose note was for \$5000 and for interest gave notice of her intention to foreclose her lien. I happened to come back during the advertising period. I met her attorney by accident, and he confessed to me that he had commenced proceedings on the report that I was about to leave the country or something of that kind. The charge had been trumped up by somebody for a purpose, and the proceedings were

(Testimony of William C. Wallace.)

then about to be completed, so to protect myself and the property I had to scurry about. I managed to get an extension of time pending negotiations for either a refunding of the loan or for a sale of enough of the property to pay Mrs. Gardner. I was satisfied at the time and I am still satisfied that there was a conspiracy among the bankers and real estate men in Oakland to prevent me from getting the loan, and to force the property upon the market at a price very much less than its value, because I brought people from the outside, from distant counties, who were satisfied with the property, and after I consulted with bankers and real estate men they declined to make the loan, and I was then put in a position where I had to do something rather drastic, [103] and I applied to a friend of mine, Mr. Whitehead, who had been with the Realty Syndicate as agent. I was one of the founders of the Realty Syndicate and I knew him to be a very able business man and a man who was a stockholder in a number of banks and he occupied a position there that could give him a good deal of influence, and I told him that I wanted him to help me out of this scrap.

Mr. AYDELOTTE.—Now just a moment. Your Honor understands, I assume, that a statement like that comes in over our objection?

The REFEREE.—Yes, you have your objection. The statements seem to be harmless, but they will not be taken—

Mr. AYDELOTTE.—(Int.) Let it be understood that I will have my objection to all this, so I will not



(Testimony of William C. Wallace.)

have to interrupt the witness.

The REFEREE.—All right.

The WITNESS.—The proposition that I made to Mr. Whitehead was that he take whatever steps might be necessary to prevent the sacrifice of the property, either by getting a new loan or by stalling off Mrs. Gardner in her proceedings until I could sell the property, and as his recompense I would give him what I estimated to be the value of my equity in the property, and which I figured at \$2000. And he did—I don't recollect what he did, because that was his business, what he did. At any rate the matter was held in abeyance until, I think, in the early part of February—I think it was about 60 days at least, of time elapsed before I came to a settlement. I think so. In the mean time I had known of course about the Realty Union. I thought I knew a great deal more about it than it appears I did; so I offered Mr. Johnson, as nearly as I can recall, a proposition like this: that if he would purchase the property for the Union at a price to be agreed upon as being fair—and that was a matter that we could not decide in a minute—that if he would furnish money enough to pay off this indebtedness, that we, the owners [104] of the property—and I assumed to act for Miss Chapman because she was a part owner in the property, though she was not involved in the difficulties therein—that we would accept for the balance of the payment the certificates of the Realty Union. Well, the thing figured out, at any rate, to the leaving of a balance of \$19,700.16 over and above

(Testimony of William C. Wallace.)

the obligations which were deducted from the flat price that had been put upon it by the Realty Union or by Mr. Whitehead as coming to me. I have his original memorandum at home. If I had thought it would have been called for I would have brought it to-day. I have his original memorandum at home, of the deductions that he made.

Mr. AYDELOTTE.—Q. Can you find that?

A. I have it at home. I can find it.

Q. Can you produce that?

A. I can produce it. It left a balance of \$19,700 and some odd dollars. The Realty Union paid \$19,700.16 in cash and gave these certificates for \$19,000, of course at par. Those were made out to Miss Chapman, because it represented the value of her property. What was coming to me over and above the obligations, went to Mr. Whitehead as his reward for pulling us out of the hole.

Mr. BRANDT.—Q. Now, Mr. Wallace, you say that you had been connected with the Realty Syndicate? A. Yes, sir.

Q. How long had you been connected with the Realty Syndicate?

A. I was one of the founders of it; one of the incorporators of it.

The REFEREE.—Q. In your statement that you have just made you have not stated in what manner Miss Chapman became the owner of the property.

A. It was by deed of conveyance from me.

Q. What was the consideration?

A. Well, love and affection. We were engaged to

(Testimony of William C. Wallace.)

be married at that time, and it seemed to be quite sufficient consideration. [105]

Mr. BRANDT.—Q. Did you have an equity in the property? A. After the conveyance?

Q. Yes. A. No.

Q. Not after the conveyance?

A. Absolutely not.

Q. Well, you say you had been with the Realty Syndicate from the time of its inception. Were you familiar with the nature of the business of the Realty Union?

A. With the nature of the business, but not with the details.

Q. The Realty Union business was transacted in the same line as the Realty Syndicate?

Mr. AYDELOTTE.—Just a moment. I ask counsel not to lead the witness.

Mr. BRANDT.—I will try not to lead the witness.

Q. What was the nature of the business of the Realty Union as compared with that of the Realty Syndicate, as to character?

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—Sustained.

Mr. BRANDT.—Q. Did you know the character of the business conducted by the Realty Union?

A. I did.

Q. Were you familiar with certificates of the character of those issued by the Realty Union?

A. Oh, yes, I had seen them and read them.

Q. Now had you, during the negotiations with the

(Testimony of William C. Wallace.)

Realty Union at any time consulted Miss Chapman about the negotiations?

A. Well, I can't say I had consulted her. I think rather that I took charge of the negotiations pretty much all myself, because it seemed to me to be the only thing to be done.

Q. Didn't she ask you anything about the certificates of the Realty Union?

A. You mean any specific questions? I can't recollect that. [106]

Q. Now, as to the nature of the obligations. I will withdraw the question. Did you make any enquiry concerning the assets and condition of the Realty Union at that time?

A. Some, yes. I considered that I was probably as good a judge of values in Oakland as there was at the time, in the real estate business; and from the statements they made of their obligations I was satisfied that their assets were sufficient to leave them in a sound position at that time.

Q. You saw some of their statements?

A. Oh, their statements were all published, and I think I saw all of them—at least, those that were published for circulation.

Q. Did the statements that you saw at that time, Mr. Wallace, show the amount of the outstanding certificates of the Realty Union?

Mr. AYDELOTTE.—Just a moment. The statements speak for themselves.

The REFEREE.—It is to arrive at the witness' knowledge. I will allow you to answer if you know.



(Testimony of William C. Wallace.)

A. My recollection is that there was a statement of the assets and of the liabilities, segregated into items. I think one of them was in the nature of encumbrances—one of the subtotals; but as to the details of that, I don't know what that included.

Mr. BRANDT.—Q. What did you know at that time with reference to the number and amount of the certificates that were outstanding, of the Realty Union?

A. I didn't know anything as to that, further than the aggregate amount that would be stated in those annual or semi-annual statements, giving the amount received from investors. That might have been on installments or upon fully paid-up certificates. There was no way from that to deduce the number of certificates that were paid up or were installment certificates. That was the aggregate amount that was received. That was all that they showed in their statements. [107]

Q. After you had investigated the condition of the company, Mr. Wallace, do you remember whether you talked it over with Miss Chapman? Did you talk the matter over with Miss Chapman?

A. Yes, I think I expressed an opinion. I don't know exactly. I can't say how or in what form I expressed an opinion.

Q. Do you remember what was the gist of that opinion?

A. That opinion was that the company was certain to succeed and to liquidate its indebtedness, including its certificates, according to their terms.

(Testimony of William C. Wallace.)

Q. What did you advise her with reference to the transaction?

Mr. AYDELOTTE.—If you advised her.

A. Yes, I advised her to accept the proposition which Mr. Johnson and myself, he representing the Realty Union and I representing the property, had arrived at with reference to this settlement of my embarrassment and the payment of the balance. I think she demurred. I think she demurred considerably to it. My impression is that I had to persuade her a little bit. Perhaps I had rather to ignore her objections. That is my recollection; because I knew there was some little feeling grew out of it.

Mr. BRANDT.—Q. Do you recall whether there was anything in the course of your conversations with her, prior to the time that the negotiations were closed, of any discussion with reference to the character of the certificates?

A. Make that a little more specific if you can. (Question read.) Oh, yes, I am quite sure that I explained the nature of the certificates, and my explanation was based upon the knowledge that I had acquired in connection with the same sort of certificates when I was familiar with the Realty Syndicate, which I had of course helped to promote, being one of the directors of the Syndicate and an officer of it; and I had remodeled [108] the certificate over and over again and we had got them into shape, such shape that we thought was explicit in the language that we wanted to convey, and Mr. Johnson, I think,

(Testimony of William C. Wallace.)

copied the form letter for letter.

Q. Do you recall whether Miss Chapman saw any of these certificates prior to the time—if you know, prior to the time that the negotiations were closed?

A. I don't know as she did. I am quite sure that I didn't show her any of the Realty Union certificates, if she did see any. She could have seen similar ones of the Realty Syndicate at prior days, in my office. But I am quite sure I didn't show her any Realty Union certificates.

Mr. AYDELOTTE.—Do I understand the witness to state that he did not show her any of the Realty Union certificates?

A. She may have seen a certificate of the character of those certificates, but I never showed her any Realty Union certificates, because I never had any myself.

Mr. BRANDT.—Q. You suggest that possibly she did; that she might have seen some Realty Syndicate certificates. Upon what do you base that?

A. Well, I was in the field for the Realty Syndicate for a long time, signing those Realty Syndicate certificates, I used to carry them in my pocket. It is quite possible that I might have exhibited them to her or to her family in general explanation as to the business I was transacting.

Q. Did Miss Chapman know that you were conducting these negotiations prior to that—prior to the time they were closed? A. Oh, yes.

Q. Did you communicate with her from time to

(Testimony of William C. Wallace.)

time with reference to it?     A. Yes.

Mr. BRANDT.—I think that is all.   [109]

Cross-examination.

Mr. AYDELOTTE.—Q. Mr. Wallace, I will ask you whether or not you thought at the time Miss Chapman was given these certificates, so-called, for \$19,000, that the money would be paid when they fell due?     A. Unquestionably.

Q. You so thought?     A. Absolutely.

Q. And you so advised Miss Chapman?

A. I so advised Miss Chapman. I so believed, surely.

Redirect Examination.

Mr. BRANDT.—Q. Was your judgment in that regard made up a great deal because of what you had seen of its realty property holdings?

A. Very largely.

Q. And did you talk with her over what the nature of the properties were, which caused you to arrive at the conviction that this concern would pay this or similar obligations?

A. Not with reference to the properties in general, no; with reference to the degree of care with which the properties had been bought, in my judgment, and the price paid, which left the institution in a solvent condition.

Q. You made mention of the fact that it did have various pieces of property, real property, which had been bought at conservative prices, did you?

A. That was the gist of my remarks, I think.

Q. You explained to her then, that the nature of



(Testimony of William C. Wallace.)

the property, with which you were familiar, and which was behind these certificates, was this real property that you have just mentioned, and which you felt was purchased with care?

A. No, I don't know that I talked exactly on that branch. That is a new thought that had not occurred to me. I don't think that I spoke along a line that would parallel that thought.

Q. What did you tell her?

A. I think, as near as I can recollect, [110] that I told her that the concern was expending money received from investors in such a way that it was not injuring its solvency nor its liability to meet its obligations when they should become due.

Q. Investing it in what?

A. In real estate, which was the only thing its charter permitted it to buy.

Q. Did you explain to her that it was a realty concern, investing the money of those who took these certificates, in real property?

A. I don't know whether I explained to her that, or whether that was a natural inference from the nature of the business.

Q. But that was understood in the discussion and the talk that you had with her?

A. I don't know what she understood, because I don't think I ever mentioned it.

Q. Did you mention to her the fact that these people were putting up this money, and that it was being invested wisely, as you say, in your judgment?

(Testimony of William C. Wallace.)

A. I think I did. I can't say now that I put it in that way.

Q. Well, did you tell her that you had been connected with the concern?

A. No, because I never was.

Q. Did you tell her that you had been connected with any similar concern? A. Yes.

Q. Did you tell her that the operation of this concern had any resemblance to the concern with which you had been connected?

A. Yes, I am quite sure I told her that.

Q. Did you tell her how the other concern operated? A. Yes, I think I explained that also.

Q. That is, that they disposed of these certificates, getting the money and putting it into real property?

A. Yes.

Q. You know that these certificates contain a clause to the effect that whenever the dividends paid its capital stockholders exceed six per cent, the certificate holder shall receive the benefit of the [111] excess paid—that they shall receive their share of it?

Mr. AYDELOTTE.—Wait a moment. We object to that question as leading.

Mr. BRANDT.—Q. Was that particular feature of these certificates pointed out to her by you?

A. No, I am quite sure that I didn't emphasize it.

Q. You are quite sure you didn't emphasize that point? A. Yes.

Q. Though you told her you had been connected with a previous concern that issued these certificates, and though you told her the holdings of

(Testimony of William C. Wallace.)

the Realty Union were in real property which was back of these investment certificates, you said nothing at all to her about the possibility of her getting anything out of these valuable properties more than a six per cent dividend?

A. Because I didn't expect she would.

Q. Did you expect that they would fail to live up to their agreement as to the payment of the six per cent?

A. No, but that is as far as I expected. That was my experience with the Realty Syndicate over a great many years.

Q. Did you get a list of properties of this concern?

Mr. AYDELOTTE.—When?

Mr. CLARK.—At the time this lady was receiving these certificates.      A. I did not.

Q. How did you know that it was investing its money wisely, then?

A. Well, from the custom in their office of marking upon the map in black ink the properties that they had purchased, and those properties would show on the map that I occasionally saw when I went in the office, all of them being in very eligible situations; and the statement showed that the amount of money that had been paid, in the aggregate, was not, in my mind, disproportionate to the property [112] they had acquired. That was the inference.

Q. Did you know what these properties were?

A. Well, no; I knew that they were real estate.

Q. Didn't you know from your knowledge of real estate, what the nature of this property was?

(Testimony of William C. Wallace.)

Mr. AYDELOTTE.—In what respect, Mr. Clark? Whether it was high or low or was subdivision property?

Mr. CLARK.—He has already testified.

Q. You say these locations on the map. Now what prices? Were there any specific prices to that property? A. Yes, sir; the aggregate prices.

Q. Do you mean to say that all you knew was the aggregate prices of the entire holdings of the company? A. That is it.

Q. And yet you would undertake to say that they had bought wisely in buying those properties?

A. Well, I would hear the conversations in the office of the Oakland managers, and they appealed to my judgment as being indicative that what they did buy they could sell at a better price.

Q. Where, generally, did you understand these properties to be located?

A. Well, it was mainly along the main thoroughfares, the main avenues; largely on San Pablo Avenue or University Avenue, in Berkeley; and on the main avenues around the head of the lake, in Oakland; all very eligible places, in my estimation.

Q. Were you familiar with those values as a real estate man?

A. Yes, I knew the relative values of them.

Q. Did you know whether the properties that were being purchased were improved or unimproved? A. Yes, I knew that.

Q. What was your knowledge in that regard?



(Testimony of William C. Wallace.)

A. That they were unimproved.

Mr. CLARK.—That is all. [113]

Recross-examination.

Mr. AYDELOTTE.—Q. Mr. Wallace, what was the price that the Realty Union agreed to pay for this property to Miss Chapman?

A. On Telegraph Avenue?

Q. Yes. Forty-fifth and Telegraph Avenue.

A. It was somewhere in the neighborhood of \$32,000. I am not quite sure. I think it figured out something over \$140 a foot; \$142 or \$143 a foot.

Q. That was around when?

A. That was in 1912.

Q. In the spring?

A. The spring of 1912; before May, I think.

Q. I will ask you—I hand you this piece of paper, Mr. Wallace, and ask you if you have ever seen this paper before?

A. I don't recollect positively the paper, but the writing looks like mine. I should say that that is my writing.

Q. I ask you to examine the paper very carefully, Mr. Wallace, and see if you recollect that particular piece of paper.

A. I am satisfied that I made that memorandum.

Q. Does that memorandum refer to this property in question? A. Unquestionably, yes.

Q. Does that memorandum refer to the purchase price of that property?

A. It seems to be a computation based upon figures that I recollect having considered at that time

(Testimony of William C. Wallace.)

with reference to the piece of property, the hundred feet on the corner and 153 feet further up on Telegraph Avenue.

Q. Then I understand that the two pieces of property adjoin one another and are one piece of property?

A. They are one piece of property, but for some reason it has been divided into two pieces.

Q. I ask you, Mr. Wallace, whether or not that statement represents the amount of money which the Realty Union agreed to pay for this property, and the other figures represent the mortgages or liens at that time, which were estimated to be the amount of the mortgages or liens, against the property? [114]

A. That is my belief, but I won't be sure until I can compare these figures with the statement of Mr. Whitehead, because there is an item here marked "Whitehead" that I don't recollect any detail—that I didn't put in any details.

Mr. AYDELOTTE.—I offer this in evidence and ask that it be marked.

(Marked: "Petitioners' Exhibit No. 6.")

Mr. BRANDT.—We object to it as immaterial and unintelligible.

Mr. AYDELOTTE.—Perhaps I can identify it better.

Q. I will ask you, Mr. Wallace, if the name written on this statement, "Mr. Whitehead," is the name of Mr. Whitehead to whom you referred in your testimony as holding mortgages against the property?

(Testimony of William C. Wallace.)

A. Surely, yes, sir.

Q. I will ask you if the number of feet shown there, 150 feet on the corner, and 153 feet and I think 66 inches, would be the proper frontage of this property on Forty-fifth and Telegraph Avenue?

A. It would be the proper frontage; 150 feet and 153 feet on Telegraph Avenue.

The REFEREE.—It will be admitted and marked “Petitioner’s Exhibit No. 6.”

Mr. AYDELOTTE.—Q. I ask you to state, Mr. Wallace, if the memorandum marked “Petitioner’s Exhibit No. 6,” the memorandum which has just been introduced in evidence, approximately represents the purchase price of the property?

A. The result given there as 19,000 and some odd dollars is within a hundred or two dollars of the result of the various computations as to the Whitehead item. I say I can’t be positive, but I know that there was 19,000 and some odd dollars and the amount of certain taxes, that was left after Mr. Whitehead made his deductions, that was the amount that was shown there.

Q. I ask you if it is not possible at the time that memorandum [115] was made up, that the exact amount of those taxes and interest and so on was not definitely known, which might account for some difference?

A. It varies from day to day. The charges upon it vary from day to day. That would have to be compared.

Q. Then as I understand, Mr. Wallace, the Realty

(Testimony of William C. Wallace.)

Union agreed to pay the liens and taxes and encumbrances upon this property, and 19,700 and some odd dollars, the 700 and some odd dollars in money and the other \$19,000 represented by these certificates which I denominate promissory notes? Is that right?

A. Well, put the word "certificates" in, yes, that was the understanding. They didn't say anything about promissory notes. That is a matter of opinion.

Q. I very adroitly put the question in that way, "which I denominate promissory notes."

A. Yes, I will say yes to that.

Q. I show you Plaintiff's Exhibits No. 2 and 3 and ask you if those are the certificates which the Realty Union gave to Miss Chapman—

Mr. CLARK.—That is conceded, Mr. Aydelotte.

Mr. AYDELOTTE.—Just a moment. I have something else to ask about.

Q. —which the Realty Union gave to Miss Chapman in evidence of the balance of \$19,000 which they agreed to pay her.

Mr. CLARK.—We object to that as calling for a conclusion.

The REFEREE.—Objection sustained.

Mr. CLARK.—It is admitted they are the certificates.

Mr. AYDELOTTE.—Q. I call your attention, Mr. Wallace, to Plaintiff's Exhibit No. 1 and ask you to read it. I ask you, Mr. Wallace if this letter marked "Plaintiff's Exhibit No.1" correctly states the fig-



(Testimony of William C. Wallace.)

ures with reference to the final settlement?

A. It does, yes.

Q. With reference to the payment of the check of \$729.36? A. I saw that letter before, yes.

Q. Was this check made payable to you?

A. No, to Miss Chapman.

Q. Made payable to Miss Chapman?

A. Yes. [116]

Redirect Examination.

Mr. CLARK.—Q. You knew, Mr. Wallace, that the Realty Syndicate exchanged land for its certificates, didn't you?

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—Objection sustained.

Mr. CLARK.—Q. Did you ever mention Realty Syndicate certificates in any talk that you had with the members of the family?

Mr. AYDELOTTE.—We object. The members of what family?

Mr. CLARK.—The Hattie Hardesty Chapman family.

The REFEREE.—I will allow the question provided it is connected in some manner with the character of the certificates issued in this case.

A. I don't think I ever mentioned them in connection with anything pertaining to this case.

Mr. CLARK.—Q. Well, not connected with this case. Did you have any talks with any members of the family, telling them anything about these Realty Syndicate certificates?

(Testimony of William C. Wallace.)

Mr. AYDELOTTE.—We object to that. The Realty Syndicate certificates have nothing to do with the Realty Union certificates.

The REFEREE.—I will allow the question.

A. Specifically I can't say that I did, but I think I did because I used to talk about my business trips that were in connection with these certificates, for the purpose of placing them.

Mr. CLARK.—Q. Well, from anything that you said in your conversations that you had with the Chapman family do you know whether they knew that those Realty Syndicate certificates were traded off for real property, to the Realty Syndicate?

Mr. AYDELOTTE.—I submit that the fact that they did or did not has nothing to do with this case, the Realty Union.

The REFEREE.—Mr. Clark, I think you should ask the direct question [117] as to getting these certificates of the Realty Union.

Mr. CLARK.—Q. You were not engaged in disposing of the Realty Union certificates?

A. I never was; no, sir.

Q. But you had disposed of a great many Realty Syndicate certificates? A. Yes.

Mr. AYDELOTTE.—We make the same objection.

Mr. CLARK.—Q. In the talks that you had with the family before this deal was closed did you tell them anything about the workings of the Realty Syndicate, in its issuing and taking up of these certificates?

Mr. AYDELOTTE.—We object to that as incom-

(Testimony of William C. Wallace.)

petent, irrelevant and immaterial. The conversations with the family might have been entirely out of Miss Chapman's presence.

Mr. CLARK.—Q. I might confine it to Mrs. Chapman and Miss Hattie Hardesty Chapman.

Mr. AYDELOTTE.—We make the same objection unless the conversation with Mrs. Chapman was in the presence of Miss Chapman.

The REFEREE.—You had better lay a foundation, showing that the operation of the Realty Syndicate and the Realty Union in regard to their certificates, the exchange of their certificates or the right to select real property in payment of the certificates was similar. Then I will allow you to ask what was said about the Realty Syndicate certificates. I will ask the witness this question:

Q. Mr. Wallace, was anything said to Miss Chapman about the fact that the certificates of the Realty Union, and their method of operation, including the exchange or the right to select real property in payment of these certificates, was similar to that of the Realty Syndicate?

A. I would have to say no to the question as a whole, because I never—the similarity that I may have called attention to was with reference merely to the obligations and its interest-bearing features. I never contemplated the exchange of [118] realty, because I never anticipated that and never knew it to be done up to that time by the Realty Syndicate, of my own knowledge.

(Testimony of William C. Wallace.)

Mr. CLARK.—Q. How long have you been connected with the Realty Syndicate?

A. From the start.

Q. How long? A. From the time it began.

Q. Don't you know of a great many people trading in their certificates for real property prior to 1912?

Mr. AYDELOTTE.—We object to that as leading and immaterial.

The REFEREE.—I sustain the objection.

Mr. CLARK.—Q. You didn't know of that, then?

Mr. AYDELOTTE.—The same objection.

The REFEREE.—Objection sustained.

Mr. CLARK.—Q. I will ask you specifically if you know of Dr. Warder Woodland prior to that time, trading in his certificates for real property?

Mr. AYDELOTTE.—We make the same objection.

The REFEREE.—The objection is sustained.

Mr. CLARK.—Q. Did you sanction the incorporation of that clause in these certificates, relating to the transfer of real property for the certificates?

Mr. AYDELOTTE.—We object to that question upon the ground that it is incompetent, irrelevant and immaterial.

The REFEREE.—Sustained.

Mr. CLARK.—Q. Were the certificates in the same form as the Realty Syndicate certificates? Were the Realty Union certificates in the same form as the Realty Syndicate certificates?

Mr. AYDELOTTE.—We make the same objection.

The REFEREE.—Sustained.



(Testimony of William C. Wallace.)

Mr. CLARK.—Q. Were the Realty Syndicate certificates talked over [119] at all by you in the the course of your conversations with Mrs. Chapman and with Miss Hattie Hardesty Chapman prior to the time of this deal?

Mr. AYDELOTTE.—We object to that as immaterial.

The REFEREE.—Objection sustained.

Mr. CLARK.—Q. The Realty Syndicate certificates were mentioned by you to Hattie Hardesty Chapman, were they not?

Mr. AYDELOTTE.—We object to that as leading.

The REFEREE.—The witness has stated to what extent. He stated that that was the entire extent of the interest-bearing features of the Realty Syndicate certificates that have been referred to.

Mr. CLARK.—Q. Do you know whether you mentioned to her the fact that the Realty Syndicate Company had taken up a great many of its certificates by turning over real property to the holders of those certificates?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial.

The REFEREE.—Sustained.

Mr. CLARK.—Q. You read over all the provisions of those certificates, didn't you, before they were turned over to Hattie Hardesty Chapman?

A. Not the Realty Union certificates, no, I don't think I did; not at that time.

Q. At what time did you read them?

A. I had read them at some prior time, but not in

(Testimony of William C. Wallace.)

connection with that transaction.

Q. Didn't you look at the face of these at all?

A. I was responsible for the correction which I notice in the face of these; inserting the word "monthly" in place of "semi-annually" in the payment of the interest, so I must have read the face of it.

Mr. BRANDT.—Will you admit, Mr. Aydelotte, that the sum mentioned in this letter, Exhibit No. 1, the letter dated June 13, 1912, to Miss Hattie H. Chapman—that the amount mentioned in this letter, [120] to wit, taxes and releases, \$332.56; paid to Mr. Dinkelspeil, \$971; assumed at the Farmers & Merchants Savings Bank, \$3192.08; paid to Mr. Whitehead, \$11,000; represented the taxes and interest and principal of the liens on the property at that time, that was then due on the property?

Mr. AYDELOTTE.—No, I will not admit that all of that was due at that time.

Mr. BRANDT.—Well, I will not say due, but owing on the property; a lien on the property.

Mr. AYDELOTTE.—Practically so, yes, with this addition, that these figures represented by the letter dated June 13, 1912, covered in Claimant's Exhibit No. 1, together with the certificates for \$19,000 represent the purchase price which calls for the property at \$160 a foot for the first hundred feet and \$125 a foot for the next 153 feet, as evidenced by the memorandum marked "Claimant's Exhibit No. 6." And this other point which I was going to ask Mr. Johnson. I don't know whether counsel will concede my

(Testimony of William C. Wallace.)

point on this, but if counsel will concede it perhaps I will not call Mr. Johnson. In his direct testimony the other day he laid stress upon the fact that this surrender value, so called, in these so-called certificates, was something of great value; and I purpose asking him this question: that if two persons would come in and demand the same piece of property in surrender of their certificates what he would do in a case of that kind?

Mr. CLARK.—That is a question that he can't ask, your Honor.

The REFEREE.—It is immaterial.

Mr. CLARK.—It is conceded that these various liens against that property in 1912 were paid off?

Mr. AYDELOTTE.—Not necessarily. They may have been assumed.

Mr. CLARK.—I will ask Mr. Aydelotte, will it be stipulated that the Realty Union did in fact discharge the mortgages and liens [121] against that property existing June 13, 1912, or at the time this deal was closed, and which it agreed to assume?

Mr. AYDELOTTE.—No, I will not admit anything of the kind.

Mr. CLARK.—I say that it is a fact that the Realty Union discharged every one of those liens and mortgages against the property which were in existence at that time.

The REFEREE.—And the present liens and mortgages are encumbrances placed on since?

Mr. AYDELOTTE.—I am willing to stipulate that whatever the record shows, now, for instance,

(Testimony of William C. Wallace.)

that the mortgage in favor of the Hibernia would not have been placed there if there was a lien on it; for I know very well that the Hibernia would not make a loan if there was an existing mortgage on it.

The REFEREE.—I understand you to stipulate it to be a fact, as Mr. Clark states it?

Mr. AYDELOTTE.—Yes, if Mr. Clark states that these mortgages and liens were all paid off, I am willing to stipulate to that.

The REFEREE.—Mr. Clark has so stated, and it is so stipulated.

Mr. CLARK.—Now then, your Honor, so that your Honor may have a complete record on the matter, and so that the decree, if necessary, can take into consideration those facts, we ought to stipulate what the existing encumbrances are, shouldn't we?

Mr. AYDELOTTE.—Yes, I think so.

Mr. CLARK.—We can agree on what mortgages and liens are on the property.

(Testimony closed; case submitted on briefs, 10, 10 and 5.)

[Endorsed]: Filed 5th day of May, 1916, at 10 o'clock A. M. A. B. Kreft, Referee in Bankruptcy, in and for the City and County of San Francisco.

[122]



(Title of Court, Cause and Number.)

**(Supplemental Testimony Taken Before Referee,  
Armand B. Kreft.)**

**Claim of Hattie Hardesty Chapman.**

Wednesday, June 21, 1916, 2 P. M.

ARMAND B. KREFT, Referee in Bankruptcy,  
Presiding.

APPEARANCES:

GEORGE CLARK, Esq., and ARTHUR H.  
BRANDT, Esq., Attorneys for Trustee.

WM. M. AYDELOTTE, Esq., Attorney for Claim-  
ant.

Mr. CLARK.—In this matter, if your Honor please, I want the privilege of offering further testimony bearing on the points at issue—on two points, particularly.

Mr. AYDELOTTE.—Those points are in the notice, *as* they not?

Mr. CLARK.—I think so. One of them I am sure you would have no objection to. I want to show the way in which, as evidenced by the records, the title to the property passed into the Realty Union. And as that is a matter of law, probably it will be stipulated to, and I apprehend that it will be more convenient for the gentlemen who are present, if we offer the oral testimony. The liens on which I want to offer additional testimony are: we want to show in a general way the amounts of the paid-up and instalment investment certificates outstanding, is-

sued by the Realty Union at the time of the transaction between Hattie Hardesty [123] Chapman and the Realty Union, and the amounts of such certificates issued thereafter, paid up to date of filing the petition in bankruptcy; that is, roughly; and we want to offer further evidence bearing on the nature of the transaction which occurred and which resulted in the issuance of the certificates to Hattie Hardesty Chapman, and particularly proof showing that at the very time of the issuance of the certificates in question, the Realty Syndicate, which had issued certificates on which the certificates in question were patterned, had been engaged in accepting certificates for real estate; that the Realty Syndicate was a company engaged in the same kind of business, and that those facts were known to Mr. Wallace, who handled the transaction between the Realty Union and Hattie Hardesty Chapman, on the part of and in behalf of Hattie Hardesty Chapman. We want also to offer the record testimony, because the record is a little confused on that point as to the steps whereby the property in question went into the Realty Union. And we want to offer in evidence the articles of incorporation, also, of the Realty Union, and its by-laws.

Mr. AYDELOTTE.—I assume, Mr. Clark, that your motion to introduce this testimony is in pursuance of your notice?

Mr. CLARK.—Yes.

Mr. AYDELOTTE.—Miss Chapman objects to the introduction of said testimony, and of the whole thereof, upon the ground that it is incompetent, ir-

relevant and immaterial. Miss Chapman does not object to the introduction of the record evidence of the title to the property in question.

The REFEREE.—The objection is sustained as to any testimony concerning the operations of the Realty Syndicate. I will, however, permit counsel to make of record the testimony he desires, so that in the event that the referee is in error in this ruling, the court [124] may have the testimony before it.

Mr. CLARK.—I would like your Honor to do this: rule on the matter only provisionally, so that after the submission of the authorities, if your Honor concludes the testimony is admissible, you may consider it.

The REFEREE.—If you desire such a ruling, Mr. Clark, you should first submit your authorities, and if you want to be heard further as to the admissibility of the testimony, the referee will hear you. It is my recollection that I did sustain, upon the hearing, objections to the testimony of some nature.

Mr. CLARK.—Your Honor had a perfect foundation for doing so at the time, I think, because Mr. Wallace expressly stated that the Realty Syndicate had not engaged in that sort of business, although we had testimony that these certificates were patterned upon the certificates of the Realty Syndicate.

The REFEREE.—That was not the basis of the Court's sustaining the objection. The reason that the Court sustained the objection was that the trans-

actions of the Realty Syndicate could not affect Miss Chapman; because not brought home to her. (Argument.) Let the ruling stand as made.

**Testimony of Roosevelt Johnson, for Trustee  
(Recalled).**

Testimony of ROOSEVELT JOHNSON, for Trustee (Recalled).

The REFEREE.—It will not be necessary for Mr. Aydelotte to make objections to all the questions relating to the Realty Syndicate. The referee is permitting counsel for the trustee to put it in subject to the objections of counsel for claimant.

Mr. CLARK.—Q. Mr. Johnson, you have been sworn in this matter?

A. Yes, sir. [125]

Q. And your attention has been called already to the Petitioner's Exhibits Nos. 2 and 3, which constitute the paid-up investment certificates of the Realty Union which were issued to Hattie Hardesty Chapman. You recognize those documents?

A. Yes, sir.

Q. Are you acquainted with William C. Wallace?

A. Yes, sir.

Q. How long have you known him?

A. Twenty-five years.

Q. Were you ever connected with the company called the Realty Syndicate?

Mr. AYDELOTTE.—If your Honor please, I want to get that straight. Does my objection go to all questions with relation to the Realty Syndicate?

The REFEREE.—Yes.



(Testimony of Roosevelt Johnson.)

Mr. AYDELOTTE.—And any questions as to the matters of the Realty Union must be specially objected to?

The REFEREE.—Yes. (Question read.)

A. I was.

Mr. CLARK.—Q. In what capacity?

A. Assistant secretary.

Q. And for how long? A. Fifteen years.

Q. Where did that company do business?

A. 14 Sansome Street and 1218 Broadway, at that time.

Q. 1248 Broadway, Oakland?

A. Oakland; yes.

Q. Where was its principal place of business?

A. It was at 14 Sansome Street until August, 1915; then it was transferred to 1218 Broadway, Oakland.

Q. And was 1218 Broadway, Oakland, its principal place of business thereafter? A. It was.

Q. Generally, what was the business of the Realty Syndicate?

A. The purchasing and improving and selling of unimproved land.

Q. Generally, what was the business of the Realty Union, this concern which is bankrupt?

Mr. AYDELOTTE.—We object to that. That has already been gone into [126] by Mr. Johnson.

The REFEREE.—The objection is overruled.

A. The purchase and improvement and sale of unimproved land.

Mr. CLARK.—Q. Did you hold the same office in the Realty Syndicate during its entire period, that

(Testimony of Roosevelt Johnson.)

you have mentioned?

A. From 1898 until 1910; twelve years.

Q. And when was—just for the purpose of the record, and for convenience—when was the Realty Union organized?     A. February, 1910.

Q. After the organization of the Realty Union were you connected with the Realty Union?

A. I was.

Q. In what capacity?     A. Vice-president.

Q. Were you its vice-president up to the time the petition in bankruptcy was filed in this case?

A. No, up to July 6, 1915.

Q. While you were an officer of the Realty Syndicate was Mr. William C. Wallace, the gentleman who participated in the transaction in question here between the Realty Union and Hattie Hardesty Chapman, connected in any way with the Realty Syndicate?

A. Part of the time he represented them as an agent in the sale of their securities.

Q. Did you have occasion to meet him from time to time?     A. Yes.

Q. How long prior to the formation, or prior to the time that you left the Realty Syndicate was Mr. Wallace connected with the Realty Syndicate?

A. From the very inception of the Syndicate he had a desk in the office, and off and on he worked for them as an agent, and off and on in the interim he would work at his personal business; but periodically he would work for the Syndicate.

Q. During the time that Mr. Wallace was con-

(Testimony of Roosevelt Johnson.)

nected with the Realty Syndicate do you know whether or not that concern was engaged in issuing investment certificates such as the Realty Union turned out? A. Yes, they were. [127]

Q. And what would you say as to the similarity or dissimilarity between the certificates issued by the Realty Syndicate and those issued by the Realty Union?

A. They were practically the same.

Q. Do you know whether prior to the time you left the Realty Syndicate that concern was allowing on account of the purchase price of its real property which it was disposing of, its investment certificate holders to turn in their certificates? A. It was.

Q. You understand I am now referring now to the clause in these two certificates here, or a provision such as is contained in the clause of these two exhibits here, whereby the holder of the paid-up investment certificate is to have the privilege, in the event that the corporation disposes of its real property, of turning those certificates in on account of the purchase price? A. I understand.

Q. You understand that? A. Yes.

Q. As I understand you, before you left the Realty Syndicate, the Realty Syndicate was engaged, in fact, in putting its property on the market and accepting in exchange on account of the purchase price, paid-up investment certificates?

A. It was, for five years prior to that.

Q. It was?

A. It was, for five years prior to that; it had ex-

(Testimony of Roosevelt Johnson.)

changed over \$2,000,000 worth.

Q. And where was the property, or where were the properties of the Realty Syndicate which were turned in, in this manner?

A. Oakland, Berkeley and Piedmont.

Q. Generally speaking, where were the holdings of the Realty Syndicate, its real property holdings?

A. All in Alameda County; mostly Oakland, Berkeley and Piedmont and Emeryville.

Q. What would you say as to the general knowledge that prevailed [128] in the community, as to the existence of this Realty Syndicate concern? It is a fact, is it not, that it had tracts of real property scattered all around, out in the Berkeley and in the Oakland sections? A. Yes.

Q. It had its signs, too, did it not, all along the car lines, showing the Realty Syndicate tracts?

A. It had signs on the tracts.

Q. Was there any car line running out from Oakland to Berkeley or Piedmont—any line of cars, from which the signs of the Realty Syndicate could not be seen?

A. Not if you travelled far enough.

Q. Did it have any subdivisions? A. Yes.

Q. It had larger tracts for subdivision purposes?

A. Yes.

Q. It dealt very extensively there in real property?

A. It had 107,000 front feet of front foot property and 11,000 acres of acreage property. It was all



(Testimony of Roosevelt Johnson.)

bunched together in Alameda County, in the north end.

Q. You said you left the Realty Syndicate in what year?  
A. 1910.

Q. And this deal was had with Hattie Hardesty Chapman in 1912?  
A. Yes.

Q. Do you know whether after you left the Realty Syndicate and became connected with the Realty Union the Realty Syndicate followed this practice that you have mentioned?

A. Yes, it did, and it is still doing it. But I got a letter this morning saying that they were going to stop it on the 10th of July.

Q. Mr. Johnson, do you know from anything about Mr. Wallace's connection with the Realty Syndicate, whether he knew that this practice was being followed by the Realty Syndicate?

A. Yes, he knew all about it. He sat in our office month after month, surrounded by about twenty agents. They were all engaged in that business, and he was fully familiar with the records.

Q. When you say "our office," you mean the office of the Realty [129] Syndicate?

A. Yes; I exchanged several million dollars in our office while he had a desk in our office. I say he had a desk. We gave him a desk. You might say it was not his desk. It was our desk, but he sat there.

Q. Could you—I don't care to have this worked out to any greater degree of nicety, but—first I will ask you, how long prior to June 1912 had the Realty Union been engaged in issuing what are called its

(Testimony of Roosevelt Johnson.)

paid-up and its instalment investment certificates?

Mr. AYDELOTTE.—We object to that as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled. This is the Realty Union.

Mr. AYDELOTTE.—Yes, but what was done before that cannot bind Miss Chapman.

The REFEREE.—The objection is overruled.

Mr. CLARK.—It is inconceivable that she didn't know about these things.

A. Beginning with June, 1910. We began issuing in June, 1910.

Q. Could you, roughly speaking, tell the court the amount of paid-up and installment investment certificates issued by the Realty Union all along, similar to those that have gone in evidence, and similar to those which have been filed in this case as claims? Can you tell us approximately what there was outstanding, of those certificates, in June, 1912?

A. There were hundreds of certificate holders of this concern; approximately 600,000.

Q. Is there any way in which you could apportion those? That is, just give an estimate, an approximate division between instalment investment certificates and the paid-up, of 1912, Mr. Johnson.

A. No. The paid-ups would be largely in excess, in amount, and the instalments largely in excess in number.

Q. Did the Realty Union after June, 1912, issue any of these certificates? I mean, other than those issued to Hattie Hardesty Chapman?

(Testimony of Roosevelt Johnson.)

A. It did; yes. [130]

Q. And could you tell us approximately what the total issue, or what increase there was, over the amount that had been issued in June, 1912?

A. More than \$100,000.

Q. More than \$100,000 were issued?

A. I believe so. Of course I am talking arithmetic. It is pretty hard to remember.

Q. I just want it generally. I don't need it stated with absolute nicety. And as regards these that were issued subsequent to June, 1912, of that hundred thousand, approximately, Mr. Johnson, what remained unpaid when the petition in bankruptcy in this case was filed?

A. I could not say what proportion of the hundred thousand remained unsold. Probably 150,000 were paid for after we began selling, and of that amount some came out of that batch and some were issued prior to that time.

Q. Yes. And you say there was a large number or a large amount of the certificates issued after June, 1912, which remained at the time of filing the petition in bankruptcy—remained unpaid?

A. Yes, there was.

Q. That ran into the thousands?

A. Oh, yes; tens of thousands.

Q. Now I think you have testified, but I want to get it clearly, and have it right in this connection, that the only way in which this company would have derived anything in the way of dividends or profits would have been by the selling of its real estate?

(Testimony of Roosevelt Johnson.)

A. By the selling at a profit.

Q. It had not, in June, 1912, as yet, begun the selling of the properties that it had accumulated, had it?

A. We began about that time. No, no; not 1912. We had not begun then yet. In June, 1914 was about the time that we began.

Q. But there was no way in which Hattie Hardesty Chapman or any others of the certificate holders could have received anything in the way of profits in this company excepting by the sale of its [131] real property? A. No.

Mr. AYDELOTTE.—Now, if your Honor please, we object to that as leading and as asking for the opinion of the witness, and as incompetent, irrelevant and immaterial.

The REFEREE.—The objection is overruled.

A. There was no other way.

Mr. CLARK.—Q. As I understand you, the business of this company was the business of acquiring tracts of real property?

A. That is what it practically amounted to; tracts of real property over around Oakland and in Berkeley; holding that real property and selling it off, at a profit.

Q. That is what it practically amounted to?

A. Yes.

Mr. AYDELOTTE.—I suggest that counsel do not ask leading questions.

The REFEREE.—I take it that there is no ques-



(Testimony of Roosevelt Johnson.)

tion as to the character of the business transacted by this concern.

Mr. AYDELOTTE.—But it might run into a question that really is important. We might as well observe the rules.

Q. I hand you what purports to be the official statement of the Realty Union at that time, June 29, 1912. Is that a correct statement of the Realty Union at that time? A. Yes, sir.

Q. I call your attention to an item under the heading of "Liabilities. Received from Investors, \$457,038.19." Of what does that item consist?

A. The amount received from investors in payment of investment certificates.

Q. Does that represent the amount of certificates issued at that time?

A. It represents the amount received from certificates issued at that time.

Q. As a matter of fact, you had issued certificates in a greater amount than that, but you had received no more cash than that?

A. The instalment certificates were payable in instalments. The [132] face of the investment certificates were in excess of this amount, but that was the amount received.

Q. As a matter of fact, there was that much worth of certificates issued at that time? A. Yes.

The REFEREE.—Q. Paid for at that time?

A. Yes.

Mr. AYDELOTTE.—Q. When you testified that

(Testimony of Roosevelt Johnson.)

about \$600,000 were issued at that time, was that the item or amount?

A. Yes, this is the item or amount.

Q. Then instead of its being \$600,000 it was only \$457,000?

A. This was June, 1912. My memory was touching only to the statement in December, 1912, which is the latest statement I had seen. I hadn't had access to this semi-annual statement recently.

Mr. CLARK.—Q. What is the date of that that you just gave?

Mr. AYDELOTTE.—June 29, 1912.

Q. I show you the financial statement of the Realty Union, dated December 31, 1912, and under the head of "Liabilities" it shows: "Received of Investors, \$550,484.69." Is that the item you referred to in your testimony as \$600,000?

A. It is. My statement was that it was approximately \$600,000.

Mr. CLARK.—I have one in 1914 which I would lilke to ask you to follow up on.

Mr. AYDELOTTE.—Q. I hand you a financial statement of the Realty Union, dated December 31, 1914, in which is the statement under the head of "Liabilities," "Received from Investors, \$858,769.-76." That is the amount for which certificates have been issued; that is, representing the amount of money you had received from certificates issued?

A. Yes, sir.

Mr. CLARK.—Can we read in the same connection

(Testimony of Roosevelt Johnson.)

from the one of December 31, 1913, showing \$774,012.30?

Mr. AYDELOTTE.—That is all right. They can be put in there in order.

Mr. CLARK.—The production of a copy of them is waived. [133]

Mr. AYDELOTTE.—Q. In these statements, Mr. Johnson, I call your attention to the Realty Union statement of June 29, 1912, under the head of “Assets,” “Realty, \$1,039,009.65.” Does that represent real property bought by certificates and other than property acquired by the Realty Union? That is the item of realty is it not?

A. Yes.

Q. And that realty was obtained by turning in property for these certificates?

A. Not entirely. It was bought by cash, certificates and other securities. It is acquired by purchases by the Realty Union.

Q. Acquired by purchases, either by cash or by these certificates? In other words, whenever the Realty Union would acquire a piece of property, you would add it into this asset column? A. Yes.

Mr. CLARK.—And as you state, part of it was acquired by the issuance of certificates?

A. Yes.

Q. Was the proportion between the paid-up certificates and the investment certificates which prevailed at the time of the filing of the petition in bankruptcy about the same in June, 1912, and in the various years through the issuance of the certificates,

(Testimony of Roosevelt Johnson.)

as regards quantity?     A. Presumably.

Q. Would you say approximately?

A. No, no. I would not say without going through my books. Some difference prevailed, the same as when they were sold; and the presumption was that the relation would be maintained.

Mr. CLARK.—Your Honor will take judicial notice of the number of these certificates and the amounts which have been presented here upon the claims. That is, if this testimony be considered, I want that to appear in this record, that we offer to show the number of claims presented against this Realty Union upon those outstanding investment certificates, paid-up and instalment. May that be considered a part of the record in this case? [134]

The REFEREE.—Yes. The claims are all on file here. The trustee can add up the totals.

Mr. CLARK.—I am not sure about the necessity of making the offer, but I simply want it understood that it is a part of this particular case, and your Honor so orders?

The REFEREE.—Yes.

**Testimony of Frank E. Grace, for Trustee.**

Testimony of FRANK E. GRACE, called for trustee, sworn.

Mr. CLARK.—Q. What is your age, Mr. Grace?

A. 31.

Q. You reside where?     A. Berkeley.

Q. Were you ever connected with a company called the Realty Syndicate?     A. I was.



(Testimony of Frank E. Grace.)

Q. That was a corporation doing business extensively in Alameda County?

A. I was connected with it.

Q. It was doing business extensively in Alameda County while you were connected with it?

A. Yes.

Q. Was it doing business over there?      A. Yes.

Q. And it had business offices in the City of Oakland and at 14 Sansome Street, San Francisco, until July, 1905?

A. And thereafter it had offices at 1218 Broadway, Oakland.

Q. What office did you have in the company? What was your connection?

A. I had no official position there. I was Mr. Johnson's assistant. He was assistant secretary.

Q. Do you know from your contact with the company and the work that you were doing, whether prior to June, 1912, that company was engaged in issuing investment certificates?      A. It was; yes.

Q. When did you leave the company?

A. In March of 1910 or the first of April, 1910.

Q. Did you leave the company about the time that Mr. Johnson did? [135]

A. About the same time; yes.

Q. And it was about that time that the Realty Union was organized?

A. The Realty Union was organized in February, 1910.

Q. Did you afterwards become connected with the Realty Union?      A. I did.

(Testimony of Frank E. Grace.)

Q. Do you know anything regarding the similarity or dissimilarity between the certificates that were issued by the Realty Union and those issued by the Realty Syndicate?

A. They were approximately the same, because I used the Realty Syndicate plates, and only made a few minor changes.

Q. Do you know whether prior to your leaving the Realty Syndicate that company was engaged in the practice of receiving its investment certificates on account of real property, and the real property which it was holding and which it was disposing of?

A. It was doing that, yes.

Q. That is, it was receiving investment certificates in exchange for real property that it was disposing of?     A. It was.

Q. Was it engaged in that practice to a small degree or to a considerable extent?

A. To a very considerable degree.

Mr. AYDELOTTE.—I will stipulate that he will testify the same as Mr. Johnson.

Mr. CLARK.—If you will stipulate that he will testify the same as Mr. Johnson, there are no further questions. In reference to all of it?

Mr. AYDELOTTE.—Yes, to all of it. Of course I don't waive any of my objections.

Mr. CLARK.—We desire to offer a copy of the by-laws, particularly Article No. 19, and wish to read it into the record. (Reading): "Any owner of investment certificates may apply the amount paid thereon, on account of the purchase of unimproved

(Testimony of Roosevelt Johnson.)

realty held for sale by the corporation." You waive the objection that proper [136] foundation has not been laid for the introduction of that particular article of the by-laws, Mr. Aydelotte? We have the original by-laws here, and this is simply a printed copy that I am reading from. Article 19 of the original reads the same way.

Mr. AYDELOTTE.—Let me see the original. (Mr. Clark hands original to Mr. Aydelotte.)

Mr. CLARK.—It is stipulated that the by-laws contained in Article 19, and that they contained at all times referred to in the testimony of the witnesses, the following provision: "Any owner of investment certificates may apply the amount paid thereon, on account of the purchase of unimproved realty held for sale by the corporation."

**Testimony of Roosevelt Johnson, for Trustee  
(Resumed).**

Mr. CLARK.—Q. Mr. Johnson, at the time, June 19, 1912, at the time of the transaction between this company and Hattie Hardesty Chapman, did it or did it not own large tracts of unimproved real property in the vicinity of Oakland and Berkeley, in Alameda County?

A. It did.

Q. Could you state it in rough figures?

A. I would have to refer to the books.

Q. Let me ask this question: Had it, at the time of the dealings—of its dealings with Hattie Hardesty Chapman, those properties which it had on hand at

(Testimony of Roosevelt Johnson.)

the time of the filing of the petition in bankruptcy herein?     A. Some of them.

Q. Well, about what proportion of the properties which were on hand at the time of the filing of the petition in bankruptcy were on hand, or was on hand, in June, 1912?

A. I would have to refer to the book.

Q. Isn't it a fact that most of the property that was on hand at [137] the time of the filing of the petition in bankruptcy was on hand in June, 1912?

A. There were a good many purchases after that date.

Q. It is true, is it not, Mr. Johnson, that all the realty holdings in the Realty Union after June, 1912, at the time of the dealing with Hattie Hardesty Chapman consisted of unimproved tracts of real property?     A. Practically.

Q. Practically all?

A. There were two pieces that were improved.

Q. And what was the value of those properties at that time?     A. At about a million dollars.

Q. Did you value them approximately at a million in 1912?     A. Yes.

(Testimony closed; case continued for argument to July 1, 1916, at 10 A. M.)



Friday, July 21, 1916, 2 P. M.

ARMAND B. KREFT, Referee in Bankruptcy,  
Presiding.

APPEARANCES:

GEORGE CLARK, Esq., Attorney for Trustee.

WM. M. AYDELOTTE, Esq., Attorney for Claimant, Hattie Hardesty Chapman.

Mr. CLARK.—If your Honor please, in this matter when we adjourned the last time it was with the understanding that we would draft a stipulation in relation to the evidence, particularly the record evidence, showing the manner in which the Realty Union succeeded to the parcels of land upon which a vendor's lien is now claimed by Hattie Hardesty Chapman. I prepared a stipulation which counsel for Miss Chapman thinks is too broad; and it has resulted in our appearing before your Honor at this time in order to have the matter settled by the court. I proposed to Mr. Aydelotte that I [138] appear and make the offer of the record—these various transactions as disclosed by the record—and that thereupon he make his objections. There is nothing in the proposed stipulation that is not warranted by the record itself. I have before me the proposed stipulation, and I will take it up and make the offer of proof of the various items of evidence as they are set forth in the stipulation.

We first offer to show that on February 23, 1912, subject to certain encumbrances and as hereinafter explained, Hattie Hardesty Chapman held title to a portion of, and William Carlton Wallace held title to

a portion of that certain real property situated in the City of Oakland, County of Alameda, State of California, and described as follows:

Commencing at the point of intersection of the eastern line of Telegraph Avenue, as the same now exists, with the northern line of 45th Street, formerly called Linden Lane; running thence northerly along said line of Telegraph Avenue two hundred and fifty-three (253) feet eight (8) inches, more or less, to the northern boundary line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north  $84^{\circ} 15'$  east three hundred and fifty-five (355) feet to the western boundary line of the land conveyed by Margaret A. Wallace, an unmarried woman, to Henry Eisenberg, by deed dated November 18th, 1908, and recorded November 23d, 1908, in liber 1531 of Deeds, page 118, said Alameda County records; thence at right angles southerly along said line two hundred and forty and  $\frac{6}{10}$  (240.6) feet more or less to the northern line of 45th Street; and thence along said last-named line south  $84^{\circ} 15'$  west four hundred and thirty-one (431) feet, more or less, to the point of commencement. Being a portion of Plot No. 35, as per Kellersberger's map of the Ranchos of V. and D. Peralta on file in the office of the County Recorder of said Alameda County.

Mr. AYDELOTTE.—We object on the ground that it is incompetent, irrelevant and immaterial; that Miss Chapman never had and never claimed to own any portion of the larger easterly portion of the tract described in paragraph in *in* the stipulation.

Mr. CLARK.—Which we concede. But you don't make any objection that we are not introducing the original record?

Mr. AYDELOTTE.—No, subject to our examination of the title papers, which counsel states he will produce. [139]

Mr. CLARK.—I haven't got any title papers.

Mr. AYDELOTTE.—I will take that and verify it.

Mr. CLARK.—The second paragraph of the proposed stipulation is that the parcel commencing at the northeastern corner of Telegraph Avenue and 45th Street; thence northerly along Telegraph Avenue 200 feet; easterly parallel with 45th Street 100 feet; thence northerly parallel with Telegraph Avenue 53 feet 8 inches more or less to the northern line of land of Alden to Wallace; easterly parallel with 45th Street 25 feet; thence southerly, parallel with Telegraph Avenue 253 feet 8 inches more or less to 45th Street; and thence westerly thereon 125 feet to commencement, was, on February 23, 1912, vested in Hattie Hardesty Chapman, a single woman of the City of Alameda, California. The parcel commencing on the eastern line of Telegraph Avenue 200 feet northerly from 45th Street; thence northerly along Telegraph Avenue 53 feet 8 inches more or less to the north *line land* of Alden to Wallace by easterly 100 feet, parallel with 45th Street, vested in William Carlton Wallace, of the City of Oakland, California, and the remainder thereof was on February 23, 1912, vested in Margaret Annie Wallace, (feme sole), of the City of Oakland, California. We offer to show

what is set forth in the paragraph which I have just read.

Mr. AYDELOTTE.—Paragraph 2 is all right.

Mr. CLARK.—We next offer to show what is set forth in paragraph 3.

Mr. AYDELOTTE.—Paragraph 3 shows Chapman and Wallace, both.

Mr. CLARK.—We make the offer now, of what is set forth in paragraph 3 of the proposed stipulation, showing that the whole of said premises were subject to encumbrances as follows:

(a) Mortgage: William Carlton Wallace, a single man, to Farmers & Merchants' Savings Bank of Oakland, California, a corporation, dated December 1, 1905, and recorded December 4th, 1905, in Liber 732 of Mortgages, page 348, made to secure the payment of sixty-five [140] hundred dollars (\$6,500) in three years after date, with interest according to the terms of a certain promissory note of even date therewith, and also as security for further advances, excepting that said mortgage did not at said time cover the northerly portion of said tract fronting 153.8 on Telegraph Avenue, and extending easterly 125 feet, and of a uniform depth.

(b) Mortgage: William Carlton Wallace (single man) to E. J. Dinkelspeil, dated September 28, 1906, and recorded September 29, 1906, in liber 770 of Mortgages, page 113, made to secure the payment of one thousand dollars (\$1000), one year after date, with interest according to the terms of a certain promissory note of even date therewith, and also as security for further advances, excepting that said



mortgages at said time covered only that part of the entire tract which the mortgage mentioned in the preceding subdivision (a) covered at said time.

(c) Deed of Trust: William Carlton Wallace, a single man, to Wm. M. Gardiner, and A. K. Munson, dated July 1, 1909, and recorded July 2, 1909, in liber 1612 of Deeds, page 168, records of Alameda County, California, made to secure the payment of six thousand dollars (\$6,000), unto Serena N. Gardiner, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covering that part of entire tract as follows: Lot on east line of Telegraph Avenue 100 feet northerly from 45th Street; northerly along Telegraph Avenue 153 feet 8 inches by 125 feet easterly.

(d) Mortgage: William Carlton Wallace, a single man, to Leander R. Webster, dated September 3, 1909, and recorded October 16, 1909, in liber 904 of Mortgages, page 169, made to secure the payment of one thousand dollars (\$1000) on September 23, 1910, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances. [141] Covered lot on east line of Telegraph Avenue 100 feet northerly from 45th Street; thence easterly 125 feet by 153 feet 8 inches northerly.

(e) Writ of Attachment: Issued out of the Superior Court of the County of Alameda, State of California, wherein Ransome-Crummey Company, a corporation, is plaintiff, and William C. Wallace is defendant, recorded November 1, 1910, in Liber 28 of

Attachments, page 329, to recover the sum of \$325.00 besides costs, etc. Levy made on said date by sheriff of Alameda County on all the right, title, claim and interest of defendant of, in and to lot at the northeastern corner of Telegraph Avenue and 45th Street, easterly on 45th Street 125 feet by 253 feet 8 inches northerly, parallel with Telegraph Avenue. In the above-entitled action in the said Superior Court, Case No. 33,995, judgment was entered against said William C. Wallace on January 15, 1912, for the sum of \$392.95, in Volume 91 of Judgments, page 583.

(f) Mortgage: Hattie Hardesty Chapman, a single woman, to E. J. Dinkelspeil, dated September 26, 1911, and recorded September 27, 1911, in Liber 969 of Mortgages, page 475, made to secure the payment of nine hundred and seventeen and 89/100 dollars (\$917.89) in one day after date, with interest at the rate of eight per cent per annum, according to the terms of a certain promissory note of even date therewith, and also as security for further advances. Covered lot at the northeastern corner of Telegraph Avenue and 45th Street, northerly along Telegraph Avenue 100 feet by 125 feet easterly on 45th Street. I offer what is set forth in paragraph 3 and all subdivisions thereof.

Mr. AYDELOTTE.—These mortgages cover the whole of it?

Mr. CLARK.—No, they cover nothing but this piece here. (Showing on plat.) [142]

The REFEREE.—(After argument.) Counsel's

statement refers to nothing but the property in dispute?

Mr. AYDELOTTE.—Counsel certainly said so.

Mr. CLARK.—I so state now. That which you refer to is merely a clerical error. I offer what is set forth in paragraph 3, subject to this additional statement, that the whole of the premises referred to in this paragraph includes only the portions of the premises by William Carlton Wallace and Hattie Hardesty Chapman.

Mr. AYDELOTTE.—That is, the property described in paragraph 2?

Mr. CLARK.—Yes, that is the property described in paragraph 2.

Mr. AYDELOTTE.—Now let that be amended to read “the property described in paragraph 2.”

Mr. CLARK.—I next offer what is set forth in paragraph 4 of the stipulation, that on February 28, 1912, William Carlton Wallace and Hattie Hardesty Chapman conveyed by grant, bargain and sale deed, said deed, duly recorded in Liber 2059 of Deeds, page 44, records of the Recorder’s Office, Alameda County, all of that part of the real property hereinbefore mentioned, standing in their *name* or in the name of either of them, unto Caro Mills, and being described as follows:

“Beginning at a point on the eastern line of Telegraph Avenue as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of said 45th Street (formerly Linden Lane); running thence northerly along said line of Telegraph Avenue one

hundred and fifty-three (153) feet, eight (8) inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north  $84^{\circ} 15'$  east one hundred and twenty-five (125) feet; thence south  $12^{\circ} 30'$  west parallel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches to a point on said line distant one hundred (100) feet northerly from the northern line of Forty-fifth Street; and thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as said plot is delineated and so designated upon Kellersberger's Map of the Ranchos of V. and D. Peralta, on file in the office of the County Recorder of the said County of Alameda."

Subject to your right to check it up, I offer what is set forth in Paragraph 4. Have you any objection to that? [143]

Mr. AYDELOTTE.—No.

Mr. CLARK.—I next offer what is set forth in Paragraph 5, as follows: That thereafter on March 8, 1912, Bradford Webster, Special Administrator of the estate of Leander R. Webster, deceased, executed a release of the mortgage hereinbefore mentioned, which had been made to Leander R. Webster, said release being duly recorded on said date in Liber 1005 of Mortgages, page 425, records of the County Recorder's office of Alameda County. I next offer what is set forth in paragraph 6.

Mr. AYDELOTTE.—That does not describe any particular property. I don't know what that covers.



Mr. CLARK.—It relates to the preceding instrument.

Mr. AYDELOTTE.—That is all right, assuming that it relates to the corner piece.

Mr. CLARK.—But it does. Paragraph 6 is as follows: That on March 18, 1912, William M. Gardiner and A. F. Munson reconveyed the property which they had received as trustees, for Serena M. Gardiner, as hereinbefore mentioned, by deed dated March 18, and duly recorded on same date in Liber 2055 of Deeds, page 305, records of the Recorder's Office of Alameda County. I next offer what is set forth in Paragraph 7.

Mr. AYDELOTTE.—Seven is all right.

Mr. CLARK.—Paragraph 7 is as follows: That on April 12, 1912, said Caro Mills executed a deed of trust, duly recorded on same date in Liber 2021 of Deeds, page 389, records of Alameda County Recorder's Office, to Charles T. Rodolph and A. E. H. Cramer, as trustees, to secure the payment of the Union Savings Bank, a corporation, of the sum of five thousand dollars (\$5,000), represented by a promissory note made to said Union Savings Bank by the said Caro Mills. That said deed of trust covered all of the property which had been conveyed by William Carlton Wallace and Hattie Hardesty [144] Chapman unto Caro Mills, as heretofore set forth. I next offer what is set forth in paragraph 8.

Mr. AYDELOTTE.—Eight is right.

Mr. CLARK.—Paragraph 8 is as follows: That on May 14, 1912, E. J. Dinkelspeil executed a release of the mortgage by release recorded on said date in

Book 1016 of Mortgages at page 265, records of the Recorder's Office of Alameda County. Said release released the mortgage recorded in Book 969 of Mortgages, page 475, same records.

Mr. AYDELOTTE.—Eight is right.

Mr. CLARK.—Next I offer what is set forth in paragraph 9, as follows: That on June 8, 1912, said E. J. Dinkelspiel executed a release of mortgage by release duly recorded on said date in Book 1009 of Mortgages, at page 392, records of the Recorder's Office of Alameda County. Said release released the mortgage hereinbefore mentioned recorded in Book 770 of Mortgages at page 113.

Mr. AYDELOTTE.—That is right.

Mr. CLARK.—Next I offer what is set forth in Paragraph 10, as follows: That on May 29, 1912, said Caro Mills, by a grant, bargain and sale deed, duly recorded on June 12, 1912, in Book 2067 of Deeds, page 266, same records; that said deed conveyed the real property hereinbefore mentioned as having been conveyed to Caro Mills.

Mr. AYDELOTTE.—To whom does that deed grant the property?

Mr. CLARK.—I think that is the deed whereby it was conveyed to the Realty Union. The statement set forth in Paragraph 10 is that the deed in question conveyed the property previously conveyed to Caro Mills, unto the Realty Union. That is, Mills granted to the Realty Union what Mills had received.

Mr. AYDELOTTE.—Subject to that correction it is all right. [145]

Mr. CLARK.—I next offer what is set forth in

paragraph 11, which is as follows: That on May 28, 1912, by a grant, bargain and sale deed, recorded on June 12, 1912, in Book 2070 of Deeds, at page 258, records of the Recorder's Office of Alameda County, Hattie Hardesty Chapman conveyed to Roosefelt Johnson all that certain real property described as follows:

"All those lots of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at the point of intersection of the eastern line of Telegraph Avenue with the northern line of 45th Street (formerly Linden Lane), as said avenue and street now exist; running thence easterly along said line of forty-fifth Street one hundred and twenty-five (125) feet; thence north  $12^{\circ} 30'$  east one hundred (100) feet; thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; thence southerly along said line of Telegraph Avenue one hundred (100) feet, more or less, to the point of beginning.

Being a portion of Plot No. 35 as said Plot is designated upon Kellersberger's map of V. & D. Peralta Ranchos, on file in the office of the County Recorder of the said County of Alameda."

Mr. AYDELOTTE.—Eleven is all right.

Mr. CLARK.—I next offer what is set forth in Paragraph 12, as follows: That on June 29, 1912, said Roosevelt Johnson and wife, by deed of conveyance recorded July 15, 1912, transferred to The Realty Union, all of the property which as heretofore mentioned was conveyed to said Roosefelt Johnson.

The deed was recorded July 15, 1912, in Book 2092 of Deeds, page 45, same records.

Mr. AYDELOTTE.—That is agreed to.

Mr. CLARK.—I next offer what is contained in paragraph 13, which is as follows: That on June 20, 1912, the Farmers' and Merchants' Savings Bank of Oakland, California, a corporation, by release of mortgage recorded on the same date in Book 1030 of Mortgages, page 418, same records, released the mortgage hereinbefore mentioned, which was recorded in Book 732 of Mortgages, page 248, same records.

Mr. AYDELOTTE.—Which is agreed to.

Mr. CLARK.—We make one offer covering paragraphs 14 to 22, inclusive, which refer to transactions relating to what was done with the [146] property that had been conveyed finally to the Realty Union; showing dealings with it right along up to the time they went into bankruptcy. The paragraphs offered are as follows:

14. That on August 7, 1913, The Realty Union, a corporation, deeded to George W. Fanning by deed of conveyance recorded on said date in Book 2202 of Deeds, page 23, same records, all that real property which was conveyed by Hattie Hardesty Chapman to Roosevelt Johnson, by deed of conveyance hereinbefore mentioned as having been made by her to him.

15. That on August 7, 1913, said George W. Fanning executed a deed of trust to E. G. Lohmann and M. A. McAuley, trustees for E. H. Lohmann, to secure the payment of the sum of ten thousand dollars (\$10,000), represented by promissory note made by



said vendor to said E. H. Lohmann; that said deed of trust covered the real property which had been conveyed to Fanning as mentioned in the last preceding paragraph, and it was recorded on August 7, 1913, in Book 2202 of Deeds, at page 25.

16. That on July 28, 1914, the trustees mentioned in the last-named deed of trust, reconveyed the property subject to the trust deed, to the said George W. Fanning, said deed of reconveyance being recorded on July 31, 1914, in Book 2256 of Deeds, at page 430, same records.

17. That on August 14, 1913, said Fanning reconveyed the property to The Realty Union, a corporation, said deed of reconveyance was recorded on the same date in Book 2190 of Deeds, at page 246, same records.

18. That on July 21, 1914, The Realty Union conveyed to Roosevelt Johnson, the property which had been previously conveyed to said Fanning, which deed of conveyance was recorded on said date in Book 2262 of Deeds, page 345, same records. [147]

19. That on July 28, 1914, said Roosevelt Johnson mortgaged said property mentioned in the last preceding paragraph, to the Hibernia Savings & Loan Society, a corporation, to secure the payment of a promissory note in the sum of \$5,000, executed by said Roosevelt Johnson to said Hibernia Savings and Loan Society; said mortgage was recorded on July 29, 1914, in Book 1069 of Mortgages, page 393, same records.

20. That on July 28, 1914, said Roosevelt Johnson mortgaged to the same mortgagee last men-

tioned, the same property, to secure the payment of a promissory note in the sum of \$5,000, executed by said Johnson to said corporation. Said mortgage was recorded on the same date, in Book 1069 of Mortgages, page 396, same records, and said mortgage included other property.

21. That on August 1, 1914, said Johnson reconveyed the property which he had mortgaged as aforesaid, to The Realty Union, a corporation, and said deed of reconveyance was recorded on September 11, 1914, in Liber 2284 of Deeds, page 189, same records.

22. The action brought by Hattie Hardesty Chapman, claiming a vendor's lien, and filed in the Superior Court of the State of California in and for the County of Alameda, against The Realty Union, a corporation, was begun on May 10, 1915, and on that date notice of *lis pendens* filed.

Mr. AYDELOTTE.—We make the same objections as to the last-mentioned paragraphs and the testimony; particularly those made to the other paragraphs heretofore mentioned.

The REFEREE.—That as I understand, relates to the Realty Union.

Mr. AYDELOTTE.—The conveyances to the Realty Union.

The REFEREE.—And the encumbrances made, of the Realty Union. The objection is overruled.

Mr. AYDELOTTE.—We waive the production of the original records [148] subject to our right to check up. As I understand, the purpose of this offer is to establish that the Realty Union dealt with this property as its own.

Mr. CLARK.—It is to show that you haven't any vendor's lien, and that if you ever had one you waived it; and second, as evidence of the fact that you waived it, we offer to show the method in which the property was dealt with.

Mr. CLARK.—I ask that the stenographer be directed to incorporate these various paragraphs in his record.

(Closed. Submitted on briefs to be filed.)

[Endorsed]: Filed 12th day of July, 1916, at 10 o'clock A. M. A. B. Kreft, Referee in Bankruptcy, in and for the City and County of San Francisco.

Filed Jun. 27, 1917, at 3 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.  
[149]

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(Title of Court and Cause.)

**Findings of Fact and Order (of A. B. Kreft, Referee,  
Disallowing Claim of H. H. Chapman).**

R. M. SIMS, Trustee of The Realty Union, a corporation, Bankrupt, having heretofore filed his petition in due form for an order of sale of all of the real estate belonging to the estate of said bankrupt, and upon the hearing of said petition, Hattie Hardesty Chapman having on December 15, 1915, appeared and set up the claim of a vendor's lien to certain of the real property in said petition described and hereinafter particularly described, as appears from her verified answer in said proceeding, and upon the hearing of said petition, and of the said claims of the said Hattie Hardesty Chapman, it having been stip-

ulated by the parties that the issues to be determined between the said Hattie Hardesty Chapman and the said trustee, should be determined by the filing of a copy of a complaint (which said complaint had prior to the filing of the petition in bankruptcy herein has been filed by the said Hattie Hardesty Chapman in the Superior Court of the State of California, in and for the County of Alameda), and by the filing of an answer to said complaint by the said trustee; and said complaint having been filed in accordance with said stipulation by the said Hattie Hardesty Chapman through her said attorney, and the said trustee having filed his answer thereto, together with an amendment to his answer, the filing of which said amendment was permitted by the Court during the hearing of said issues; and the hearing of the issues raised by the said complaint and the answer thereto, having come on regularly for hearing on March 29, 1916, upon stipulation of the parties that the referee should decide said issues and determine the question as to whether such vendor's lien did or did not exist; and the hearing of said issues having been continued from time to time and finally submitted to the referee for decision, and the matters in issue having been fully argued in briefs filed with the referee upon such admission, the referee now makes the following decision and order:

[150]

THE FOLLOWING FACTS ARE FOUND TO BE  
TRUE:

1.

That on February 23, 1912, and prior to any of the



negotiations resulting in the making of any transfer of real property by the said Hattie Hardesty Chapman to said The Realty Union, a corporation, the real property mentioned in the complaint was owned, as follows:

I. The parcel bounded by beginning at the north-east corner of Telegraph Avenue and 45th Street, and running thence northerly along Telegraph Avenue 200 feet; easterly parallel with 45th Street 100 feet; thence northerly parallel with Telegraph Avenue 53 feet 8 inches more or less to the northern line of the entire tract; easterly parallel with 45th Street 25 feet; thence southerly, parallel with Telegraph Avenue, 253 feet 8 inches more or less to 45th Street; and thence westerly thereon 125 feet to the point of commencement, was on February 23, 1912, owned by Hattie Hardesty Chapman, a single woman, of the City of Alameda, California.

II. The parcel commencing on the eastern line of Telegraph Avenue 200 feet northerly from 45th Street; thence northerly along Telegraph Avenue 53 feet 8 inches more or less to the north line of land granted by Alden to Wallace (the north line of the entire tract); thence easterly along said line 100 feet; thence southerly parallel with Telegraph Avenue 53 feet 8 inches; thence westerly 100 feet to the point of beginning, was owned by William Carlton Wallace, and also known as William C. Wallace.

2.

That the said premises were on said February 23, 1912, subject to encumbrances as follows:

(a) A mortgage made by William Carlton Wal-

lace, a single man, to Farmers & Merchants Savings Bank of Oakland, California, a corporation, dated December 1, 1905, and recorded December [151] 4, 1905, in Liber 732 of Mortgages, page 348, to secure the payment of sixty-five hundred dollars (\$6500) in three years after date, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covered the entire tract, excepting that said mortgage did not at said time cover the northerly 153 feet 8 inches of said tract fronting on Telegraph Avenue and extending easterly from Telegraph Avenue, 125 feet, and of a uniform depth.

(b) A mortgage made by William Carlton Wallace, a single man, to E. J. Dinkelspiel, dated September 28, 1906, and recorded September 29, 1906, in Liber 770 of Mortgages, page 113, to secure the payment of one thousand dollars (\$1,000), one year after date, with interest according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covered that part of the entire tract which the mortgage mentioned in the preceding subdivision (a) covered at said time.

(c) A deed of trust executed by William Carlton Wallace, a single man, to Wm. M. Gardiner, and A. K. Munson, dated July 1, 1909, and recorded July 2, 1909, in Liber 1612 of Deeds, page 168, records of Alameda County, California, and made to secure the payment of six thousand dollars (\$6,000), unto Serena N. Gardiner, with interest, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covered that

part of the entire tract as follows: Lot on east line of Telegraph Avenue 100 feet northerly from 45th Street; northerly along Telegraph Avenue 153 feet 8 inches, by a uniform depth of 125 feet easterly.

(d) A mortgage executed by William Carlton Wallace, a single man, to Leander R. Webster, dated September 3, 1909, and recorded October 16, 1909, in Liber 904 of Mortgages, page 169, and made to secure the payment of one thousand dollars (\$1,000) on September 23, 1910, with interest, according to the terms of a certain promissory note of even date therewith, and also as security [152] for further advances, covered the lot on the east line of Telegraph Avenue, 100 feet northerly from 45th Street; thence easterly a uniform depth of 125 feet by 153 feet 8 inches northerly.

(e) A writ of attachment issued out of the Superior Court of the County of Alameda, State of California, wherein Ransom-Crummey Company, a corporation, was plaintiff, and William C. Wallace was defendant, recorded November 1, 1910, in Liber 28 of Attachments, page 329, to recover the sum of \$325.00 besides costs. Levy of said writ was made on said date by the sheriff of Alameda County on all the right, title, claim and interest of defendant, of, in and to lot at the northeastern corner of Telegraph Avenue and 45th Street, easterly on 45th Street 125 feet by 253 feet 8 inches northerly, parallel with Telegraph Avenue.

In the above-entitled action in the said Superior Court, Case No. 33995, judgment was entered against said William C. Wallace, on January 15, 1912, for the

sum of \$392.95, in Volume 91 of Judgments, page 583.

(f) A mortgage executed by Hattie Hardesty Chapman, a single woman, to E. J. Dinkelspiel, dated September 26, 1911, and recorded September 27, 1911, in Liber 969 of Mortgages, page 475, made to secure the payment of nine hundred and seven and 89/100 dollars (\$907.89) in one day after date, with interest at the rate of eight per cent per annum, according to the terms of a certain promissory note of even date therewith, and also as security for further advances, covered lot at the northeastern corner of Telegraph Avenue and 45th Street, northerly along Telegraph Avenue, 100 feet by 125 feet easterly on 45th Street.

All recordation in this decision referred to was in the records of the County Recorder's Office of Alameda County.

3.

On February 28, 1912, William Carlton Wallace and Hattie Hardesty Chapman, conveyed by grant, bargain and sale deed, which [153] was duly recorded in Liber 2059 of Deeds, page 44, records of the Recorder's Office, Alameda County, all of that part of the real property hereinbefore mentioned, standing in their names or in the name of either of them, unto Caro Mills, and being described as follows:

"Beginning at a point on the eastern line of Telegraph Avenue, as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of 45th Street (formerly Linden Lane); running thence northerly along said line of Telegraph Avenue one hundred and fifty-three (153) feet, eight (8)



inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north  $84^{\circ} 15'$  east one hundred and twenty-five (125) feet; thence south  $12^{\circ} 30'$  west parallel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches, to a point on said line distant one hundred (100) feet northerly from the northern line of 45th Street; and thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as said plot is delineated and so designated upon Kellersberger's Map of the Ranchos of V. & D. Peralta, on file in the office of the County Recorder of the said County of Alameda."

4.

That thereafter on March 8, 1912, Bradford Webster, Special Administrator of the estate of Leander R. Webster, Deceased, executed a release of the mortgage hereinbefore mentioned which had been made by Leander R. Webster.

5.

That on March 18, 1912, William M. Gardiner and A. M. Munson reconveyed the property which they had received as trustees for Serena N. Gardiner, as hereinbefore mentioned.

6.

That on April 12, 1912, said Caro Mills executed a deed of trust, which was duly recorded on same date in Liber 2021 of Deeds, page 389, records of Alameda County Recorder's Office, to Charles T. Rodolph and A. E. H. Cramer, as trustee, to secure

the payment to the Union Savings Bank, a corporation, of the sum of five thousand dollars (\$5000), represented by a promissory note made to said Union Savings Bank by the said Caro [154] Mills. That said deed of trust covered all of the property which had been conveyed by William Carlton Wallace and Hattie Hardesty Chapman unto Caro Mills, as hereinbefore set forth.

## 7.

That on May 14, 1912, E. J. Dinkelspiel executed a release of the mortgage recorded in book 969 of Mortgages, page 475, same records.

## 8.

That on June 8, 1912, said E. J. Dinkelspiel executed a release of the mortgage recorded in Book 770 of Mortgages, at page 113.

## 9.

That on May 29, 1912, said Caro Mills, by a grant, bargain and sale deed, duly recorded on June 12, 1912, in book 2067 of Deeds, page 266, conveyed to The Realty Union, a corporation, the real property hereinbefore mentioned as having been conveyed to said Caro Mills.

## 10.

That on May 28, 1912, by a grant, bargain and sale deed, recorded on June 12, 1912, in Book 2070 of Deeds, at page 258, records of the Recorder's Office of Alameda County, Hattie Hardesty Chapman conveyed to Roosevelt Johnson all that certain real property described as follows:

"All of those lots of land situated in the City of Oakland, County of Alameda, State of California,

bounded and described as follows, to wit:

Beginning at the point of intersection of the eastern line of Telegraph Avenue with the northern line of 45th Street (formerly Linden Lane) as said avenue and street now exist; running thence easterly along said line of 45th Street one hundred and twenty-five (125) feet; thence north  $12^{\circ} 30'$  east one hundred (100) feet; thence south  $84^{\circ} 15'$  west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; thence southerly along said line of Telegraph Avenue one hundred (100) feet, more or less, to the point of beginning. [155]

Being a portion of Plot No. 35, as said plot is delineated and so designated upon Kellersberger's Map of V. & D. Peralta Ranchos, on file in the office of the County Recorder of the said County of Alameda."

11.

That on June 29, 1912, said Roosevelt Johnson and wife, by a deed of conveyance recorded July 15, 1912, transferred to The Realty Union, all of the property which as hereinbefore mentioned, was conveyed to the said Roosevelt Johnson. The deed was recorded July 15, 1912, in Book 2092 of Deeds, page 45, same records.

12.

That the facts hereinbefore set forth show the transactions relating to the title to the property involved in the complaint from a time prior to the negotiations between The Realty Union, a corporation, and Hattie Hardesty Chapman, which resulted in the making of any deeds by the said Hattie Hardesty

Chapman, or William Carlton Wallace, covering property that went eventually to the said corporation, through deeds made by Caro Mills and Roosevelt Johnson, and that it was only by the conveyances hereinbefore mentioned that the real property mentioned in the complaint was transferred to said corporation, The Realty Union, and that as to the said real property hereinbefore particularly specified in subdivision 2 of paragraph 1 hereof, the same was not transferred by the said Hattie Hardesty Chapman to the said The Realty Union, a corporation, or to any of its agents or officers. That said facts also show certain of the releases and satisfactions of liens which said The Realty Union, agreed to discharge on acquiring said real property.

## 12a.

That in the transactions hereinbefore mentioned, with which Caro Mills and Roosevelt Johnson were connected, they, the said Caro Mills and the said Roosevelt Johnson, were acting for said The Realty Union, a corporation, and while said transactions were in the name of the said Caro Mills and the said Roosevelt Johnson respectively, [156] they were in fact transactions of the said, The Realty Union, a corporation, acting through its agents.

## 12b.

The considerations for the transfers of said real property to The Realty Union, which were made, as hereinbefore found by the Court, were:

(a) The execution, issuance and delivery to the said Hattie Hardesty Chapman by the said The



Realty Union, a corporation, of certain of its Investment Certificates, true copies of which are as follows, to wit:

"No. 10219. E. \$10,000

Investment Certificate

Issued by

THE REALTY UNION

Incorporated 1910, under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN OF ALAMEDA, CALIFORNIA, TEN THOUSAND DOLLARS with interest at the rate of six per cent per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent per annum, the rate of interest paid hereon for the same periods shall be increased to equal the rate of said dividends.

6%

GOLD

6%

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid-up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President countersigned by its Auditor at its office in the City and County of San Francisco, State of California,

this sixth day of June, 1912.

ROOSEVELT JOHNSON,  
Vice-president.

(Corporate Seal.)

JESSE B. FULLER,  
Secretary.

Countersigned by  
G. W. FANNING,  
Auditor.

UNITED STATES OF AMERICA." [157]

"No. 10220. E. \$9000

Investment Certificate

Issued by

THE REALTY UNION

Incorporated 1910, under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN OF ALAMEDA, CALIFORNIA, NINE THOUSAND DOLLARS with interest at the rate of six per cent per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent per annum, the rate of interest paid hereon for the same periods shall be increased to equal the rate of said dividends.

6%

GOLD

6%

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid-up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President

or Vice-president and by its Secretary and countersigned by its Auditor at its office in the City and County of San Francisco, State of California, this sixth day of June, 1912.

ROOSEVELT JOHNSON,  
Vice-president.

(Corporate Seal.)

JESSE B. FULLER,  
Secretary.

Countersigned by  
G. W. FANNING,  
Auditor.

UNITED STATES OF AMERICA."

(b) The agreement of said The Realty Union to assume and pay the indebtedness against the said real property secured by the mortgage and trust deeds and liens hereinbefore specified, amounting to the sum of fifteen thousand four hundred ninety-five and 66/100 dollars (\$15,495.66), or thereabouts, and the payment to said Hattie Hardesty Chapman by the said The Realty Union, a corporation, of the sum of seven hundred and twenty-nine and 36/100 dollars (\$729.36) in cash; that pursuant to said agreement said The Realty Union did assume and paid said indebtedness which it had agreed to assume and pay as aforesaid.

13.

That subsequent to the time when said The Realty Union became interested in the real property upon which the said Hattie Hardesty Chapman claims a vendor's lien, it the said The Realty [158] Union

mortgaged the said real property, and that said mortgages do not purport to be subordinate to the said vendor's lien; that on July 28, 1914, said The Realty Union transferred said real property to Roosevelt Johnson, who, acting for said The Realty Union, made mortgages thereon to the Hibernia Savings and Loan Society, a corporation; that the first of said mortgages covered the southerly one hundred (100) feet of the entire tract, and was made to secure the payment of a loan to the said The Realty Union in the sum of five thousand dollars (\$5000). Said mortgage was recorded on July 29, 1914, in Liber 1069 of Mortgages, at page 393, in the Recorder's Office of Alameda County, California, and said mortgage is still in force and effect.

That in the same manner said Roosevelt Johnson on said July 28, 1914, mortgaged the remainder of said real property to said Hibernia Savings and Loan Society, a corporation, to secure a loan to the said The Realty Union, in the sum of five thousand dollars (\$5000). Said mortgage was duly recorded on July 29, 1914, in Liber 1069 of Mortgages, at page 393, in the Recorder's Office of Alameda County, California, and said mortgage is still in force and effect.

That said Hattie Hardesty Chapman did not make any objection to the making of said mortgages, or to the existence thereof, and that said Hattie Hardesty Chapman never asserted any right to a vendor's lien upon the said real property, or any portion thereof, until the said The Realty Union became involved in financial difficulties and failed to pay interest upon



its investment certificates.

14.

That in the transactions whereby the real property mentioned in the complaint was transferred to The Realty Union, a corporation, the said Hattie Hardesty Chapman was represented [159] by one William Carlton Wallace; that in said transactions said William Carlton Wallace acted as the agent for the said Hattie Hardesty Chapman; that said William Carlton Wallace, as such agent, participated in the negotiations resulting in the transfer of the real property mentioned in the *complaints* to said The Realty Union, a corporation. That the said William Carlton Wallace was at all times during said negotiations, and as such agent, familiar with the nature of the business which said The Realty Union, a corporation, was engaged in transacting; that the said Hattie Hardesty Chapman is chargeable with the knowledge of the said William Carlton Wallace.

That at the time the real property mentioned in the complaint was transferred to the said The Realty Union, a corporation, through the said Caro Mills and the said Roosevelt Johnson, acting for said company, both the said William Carlton Wallace and said Hattie Hardesty Chapman knew, and the facts were, that the business of the said The Realty Union was that of acquiring large tracts of unimproved real property, through the issuance, sale or disposition of certificates of the same character and form as those mentioned in the complaint, for the purpose of holding said real property and under a plan whereby

said real property was to be held for sale at an increased price.

That the obtaining of or the acquiring of any such certificates by Hattie Hardesty Chapman, constituted an investment in such enterprise of obtaining, holding and selling land.

That it was fully understood by the said Hattie Hardesty Chapman, at the time she acquired the said investment certificates hereinbefore mentioned, and it was a fact, that she was not to have any preferred right over any other holder of investment certificates in or to the real property mentioned in the complaint and which was transferred to said The Realty Union, a [160] corporation, except such right as might be acquired under the terms and conditions of said investment certificates, and through the exercise of any such rights as were created thereby.

15.

That the said Hattie Hardesty Chapman is estopped from claiming that she has any vendor's lien upon any of the property mentioned in the complaint; that said Hattie Hardesty Chapman fully understood and knew, when the property in the complaint described was transferred to said The Realty Union, that said The Realty Union had, prior to the time of any negotiations or dealings between the said Hattie Hardesty Chapman and said corporation, been engaged in issuing, was, at said time engaged in issuing, and would thereafter be engaged in issuing to persons rendering considerations equal to the full face value thereof, certificates in substantially the

same form as the investment certificates issued to the said Hattie Hardesty Chapman. That the said The Realty Union, a corporation, subsequent to the time of the issuance of the investment certificates mentioned in the complaint of the said Hattie Hardesty Chapman, issued investment certificates in the same form as those which had been issued to Hattie Hardesty Chapman; that said investment certificates aggregated several hundred thousands of dollars in amount; that as the said Hattie Hardesty Chapman well knew the said investment certificates so issued were acquired by innocent purchasers, and for value.

That as the said Hattie Hardesty Chapman at all times well knew, in acquiring the investment certificates mentioned in the complaint, it was a part of the plan and arrangement whereby said investment certificates were issued, that the certificate holders made an investment in acquiring their certificates, whereby all the investment certificate holders were equally concerned and shared the same risks, duties and privileges. That said plan was entirely inconsistent with the retention by the said Hattie [161] Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time said investment certificates mentioned in the complaint were issued to said Hattie Hardesty Chapman; that in accepting said investment certificates said Hattie Hardesty Chapman joined in said plan and became entitled to share equally with all other certificate holders in the benefits of said plan.

That the said investment certificate holders hereinbefore mentioned, are the same as those investment certificate holders who have presented their claims in bankruptcy in this proceeding, and as shown by the files in this cause.

FROM THE FOREGOING, THE COURT CONCLUDES:

That the said Hattie Hardesty Chapman, plaintiff and claimant herein, is not entitled to and has no vendor's lien upon the real property mentioned in the complaint, or any portion thereof, and that the said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever, and it is accordingly

ORDERED that the prayer of plaintiff's complaint be, and the same is, hereby denied, and that the plaintiff is not entitled to and has no vendor's lien upon the real property mentioned in the complaint, and hereinbefore mentioned, or upon any portion thereof, and that the said plaintiff has no claim or interest in the said real property, aside from her interest as a general creditor of the estate of said bankrupt, and that the said Hattie Hardesty Chapman is not entitled to any relief herein.

The property herein referred to is described as follows: [162]

"All that piece and parcel of property located in the City of Oakland, County of Alameda, State of California, more particularly described as follows:

BEGINNING at the southeast corner of Telegraph Avenue and 45th Avenue (or street), which last mentioned avenue or street was formerly known as



Linden Lane, and running thence northerly along the easterly line of Telegraph Avenue, 253 feet, 8 inches; thence easterly, parallel with the line of said 45th Avenue, (or street) 125 feet; thence southerly, parallel with said easterly line of Telegraph Avenue, 253 feet, 8 inches, to the northerly line of said 45th Avenue (or street); thence westerly along the northerly line of said 45th Avenue (or street), 125 feet to the point of commencement, the same being a tract of land having a frontage of 253 feet, 8 inches on Telegraph Avenue, with a uniform depth of 125 feet, measured on a line parallel with the northerly line of said 45th Avenue (or street).''

Dated May 18th, 1917.

ARMAND B. KREFT,  
Referee in Bankruptcy.

[Endorsed]: Filed May 18, 1917, at 2 o'clock and 25 min. P. M. A. B. Kreft, Referee in Bankruptcy.  
[163]

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(Title of Court and Cause.)

**Petition to Review Order of Referee Disallowing  
Claim of Hattie Hardesty Chapman and Excep-  
tion to Referee's Report.**

In the proceeding herein on behalf of said Hattie Hardesty Chapman, as plaintiff, vs. R. M. Sims, trustee, etc.

The petition of Hattie Hardesty Chapman respectfully represents that on May 18th, 1917, manifest error to the prejudice of complainant was made by the referee in the above-entitled matter and pro-

ceeding in a finding and order wherein and whereby said referee ordered and concluded that said Hattie Hardesty Chapman was not entitled to and had no vendor's lien upon the real property therein mentioned and that said real property was free from any claim of said Hattie Hardesty Chapman whatsoever and wherein and whereby said referee ordered that the prayer of said Hattie Hardesty Chapman be denied and that she be not entitled to a vendor's lien upon and that she has had no claim or interest in the real property described in her complaint aside from her interest as a general creditor of the estate of said bankrupt:

And said Hattie Hardesty Chapman hereby objects to the finding of fact and order of said referee as aforesaid and excepts thereto for the reasons hereinafter stated.

The said errors complained of are:

I.

That the evidence adduced before the referee is insufficient to justify the finding of said referee that the parcel of land commencing from the easterly line of Telegraph Avenue two hundred (200) feet northerly from 45th Street as described in the second paragraph of finding No. I of the finding of said referee was owned by William Carlton Wallace also known as William C. Wallace, [164] at the time referred to in said finding or at any other time, on the contrary, said evidence shows that said parcel of land was included in the sale to The Realty Union for which the entire consideration went to said

Hattie Hardesty Chapman and was in fact owned by her.

## II.

That the evidence adduced before said referee is insufficient to justify the finding of said referee (See finding No. 12 subdivision 2 of paragraph I of said finding), that said property was not transferred by the said Hattie Hardesty Chapman to the said The Realty Union, a corporation, or to any of its agents or officers; on the contrary, said evidence shows that in the matter of said transfer said property was transferred by said Hattie Hardesty Chapman to the said The Realty Union, a corporation, through William C. Wallace acting as her agent.

## III.

That the evidence adduced before said referee is insufficient to support the finding of said referee (See Third paragraph of finding No. 14) that the obtaining or the acquiring of said or any certificates by said Hattie Hardesty Chapman constituted an investment in the enterprise therein mentioned of obtaining, holding and selling land.

## IV.

That the evidence adduced before said referee is insufficient to justify the finding of said referee (See Fourth paragraph of finding No. 14) that it was fully understood by the said Hattie Hardesty Chapman at the time she acquired the said Investment Certificates therein mentioned, or that it was a fact, that she was not to have any preferred right over any other holder of Investment Certificates in or to the real property mentioned in her complaint and which was

transferred to said The Realty Union, a corporation, except such right as might be acquired under the terms and conditions of said Investment Certificates, and through the exercise [165] of any such rights as were created thereby; on the contrary, the evidence adduced before said referee shows that at the time she acquired the said Investment Certificates she had no understanding with said The Realty Union or any one at all concerning her rights under the Investment Certificates other than appears from the language used in such certificates and that she did not have any understanding or agreement that she was not to have any preferred right over any other holder of Investment Certificates in or to the real property mentioned, but that it was a fact that she retained and reserved to herself and did not surrender any right in law or in equity that she might be entitled to in said real property by way of lien thereon.

#### V.

That said referee erred in finding from the evidence that the said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's lien upon any of the property mentioned in the complaint.

#### VI.

That the evidence adduced before said referee is insufficient to justify the finding of said referee (See finding No. 15 end of first paragraph thereof) that the Investment Certificates issued by said corporation subsequent to the time of the issuance of said Investment Certificates to the said Hattie Hardesty Chap-



man were issued to or acquired by innocent purchasers, or for value, and is insufficient to justify the finding that said Hattie Hardesty Chapman well knew that said Investment Certificates so issued were acquired by innocent purchasers or for value.

#### VII.

That the evidence adduced before said referee is insufficient to justify the finding of said referee that said Hattie Hardesty Chapman knew in acquiring the Investment Certificates mentioned in the complaint, that it was a part of the plan and [166] arrangement whereby said Investment Certificates were issued, that the certificate holders made an investment in acquiring their certificates, whereby all the investment certificate holders were equally concerned and shared the same risks, duties and privileges.

#### VIII.

That said referee erred in concluding that the plan and arrangement whereby said Investment Certificates were issued, was inconsistent (See Second paragraph of finding No. 15) with the retention by the said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred by said corporation at the time said Investment Certificates mentioned in the complaint were issued to said Hattie Hardesty Chapman, and that said referee erred also in his conclusions that in accepting said Investment Certificates, said Hattie Hardesty Chapman joined in said plan.

#### IX.

That said referee erred in concluding that said

Hattie Hardesty Chapman is not entitled to and has no vendor's lien upon the real property mentioned in the complaint or upon any portion thereof; and in concluding that the said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

X.

That said referee erred in ordering that the prayer of plaintiff's complaint be denied and in ordering that said Hattie Hardesty Chapman is not entitled to and has no vendor's lien upon the real property mentioned in said complaint or upon any portion thereof, and that said plaintiff has no claim or interest in said real property aside from her interest as a general creditor of the estate of said bankrupt, and erred in ordering that said Hattie Hardesty Chapman is not entitled to any relief herein.

XI.

That said referee erred in his conclusions of law from [167] the evidence offered at said hearing.

WHEREFORE, said Hattie Hardesty Chapman opposes and excepts to the report of said referee and prays that she may be decreed by the Court to have her claim against said bankrupt estate allowed in full, that is to say, that she do have and recover against said R. M. Sims, trustee in bankruptcy of The Realty Union, bankrupt, judgment in the sum of Nineteen Thousand (\$19,000.00) Dollars together with interest thereon from the 6th day of March, 1915, to the date of the entry of the decree herein at the rate of six (6%) per cent per annum; that it

be declared and adjudged by said Court that said Hattie Hardesty Chapman has a lien as vendor upon the premises described in her complaint herein for the payment of said purchase money; that in case said defendant shall not pay said judgment or discharge said lien, that said premises may be sold and so much of the proceeds as may be necessary be applied to the payment of the judgment so rendered; and that plaintiff have such other further and additional relief and judgment as may be desired by her and as may be agreeable to equity, besides costs.

And said Hattie Hardesty Chapman also prays that said order entered herein by the referee on May 18th, 1917, be reviewed by the Honorable Judge of the District Court of the United States for the Northern District of California, and that she be restored to all things lost by reasons of the finding and order of the referee in said order.

HATTIE HARDESTY CHAPMAN,

W. W. A.

WM. M. AYDELOTTE,

C. A. S. FROST,

Her Attorneys.

(Duly verified.)

[Endorsed]: Filed June 12, 1917, 3 P. M. A. B.  
Kreft, Referee. [168]

(Title of Court and Cause.)

**Referee's Certificate on Petition to Review.**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States,  
Southern Division of the Northern District  
of California:

The undersigned, Referee in Bankruptcy, to  
whom was referred the above-entitled matter, re-  
spectfully certifies and reports:

That on May 18, 1917, an order was made herein  
denying the claim of Hattie Hardesty Chapman to  
a vendor's lien on certain real property belonging  
to the estate of said bankrupt.

On June 12, 1917, within time extended by the  
referee, said claimant feeling aggrieved by said  
order, filed a petition to review the same.

Upon the hearing of the claim William A. Aydel-  
otte, Esq., appeared for the claimant, and George  
Clark, Esq., and R. H. Cross, Esq., and Arthur  
Brandt, Esq., appeared on behalf of the Trustee.  
The referee's findings of facts are contained in the  
order reviewed.

The Realty Union was adjudged a bankrupt on  
September 11th, 1915. R. M. Sims was elected  
Trustee. On December 4th, 1915, the Trustee filed  
a petition for an order to sell, free and clear of liens,  
the real property of the estate, consisting of 41 par-  
cels. An order to show cause was issued to the  
various lien claimants including Hattie Hardesty  
Chapman, to show cause, if any they had, why said



petition should not be granted, and to propound their claims before this court and show cause why the lien claimants and others claiming title should not be remitted to the proceeds of the sale of said property, in accordance with their interest therein.

On December 15th, 1915, Hattie Hardesty Chapman filed an answer to said order to show cause setting up a claim of vendor's [169] lien to certain real property in Oakland, having a frontage of 263.66 feet on Telegraph Avenue by 125 feet on 45th Street, and alleging that on the 11th day of May, 1915, the claimant filed an action in the Superior Court of Alameda County praying that it be declared and adjudged that claimant has a lien as a vendor upon said real estate for the payment of the purchase money. It was later agreed between the parties that the matter presented by said complaint in the State court be determined by this Court. On March 22d, 1916, the Trustee filed an answer to the complaint and on August 25th, 1916, an amended answer. A copy of the complaint is contained in the claimant's answer to the order to show cause. The pleadings consist of said complaint and the answer and amended answer of the Trustee thereto.

The business of the Realty Union was that of acquiring and selling real property. It issued what it termed "Investment Certificates." Prior to the transaction in question approximately \$400,000 has been received from the sale of its investment certificates. Up to December 31st, 1914, \$858,769.76 had been received from investors. The certificates are unsecured. Upon acquiring the property upon

which Hattie Hardesty Chapman claims a vendor's lien, the Realty Union paid Hattie Hardesty Chapman, \$729.36 in cash and issued to her two certificates, "Exs. 2 and 3," one in the sum of \$9,000 and one in the sum of \$10,000. No part of the \$19,000 has been paid, and said amount together with some interest thereon, is owing from said company to the claimant.

It is contended on behalf of Miss Chapman that said certificates are promissory notes and that her claim is for the purchase price of the property and is unsecured, and that under the provisions of sec. 3046 of the Civil Code, she holds a lien on said property for the balance owing to her. The section reads as follows: [170]

"LIEN OF SELLER OF REAL PROPERTY. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

At the time of the transfer of the property to the Realty Union, it was encumbered by mortgages, deeds of trust and liens aggregating \$15,495.66; these liens were all paid by the Realty Union. The Realty Union subsequently mortgaged said property in the sum of \$10,000, which mortgages are still in force. One William C. Wallace, formerly was the owner of the property. He was engaged to be married to the claimant, Hattie Hardesty Chapman. In the consideration of love and affection he conveyed to her the portion of the property described in paragraph one, subdivision one, of the order reviewed, page 2.

The portion of the property described in paragraph one, subdivision two, page 3, had not been conveyed by him to Miss Chapman. On February 28, 1912, William C. Wallace and Hattie Hardesty Chapman conveyed to Caro Mills a portion of the property in question described in paragraph 3, page 6 of the order reviewed, which conveyance included the portion of the property the title to which stood of record in the name of William C. Wallace, and which had not been theretofore conveyed by Wallace to Miss Chapman, referred to in paragraph one, subdivision one of the order. The remainder of the property in question was on May 28th, 1912, conveyed by Miss Chapman to Roosevelt Johnson. Caro Mills and Roosevelt Johnson acquired the property on behalf of the Realty Union and it was subsequently conveyed to the Realty Union. As to the north 53 feet 8 inches fronting on Telegraph Avenue, which is the portion Mr. Wallace had not prior to the transfer in question conveyed to Miss Chapman, the Trustee contends: That the vendor's lien is not assignable and, therefore, the attempt of Mr. Wallace to give to the claimant his right to the part of the certificates issued for said portion was wholly ineffectual and caused a waiver of the [171] lien. He refers to several cases including *Baum v. Grigsbe*, 21 Cal. 173, quoting: "It is in the nature of a personal privilege unassignable, which the vendor can assert, only in a suit brought for the purpose of having it decreed and enforced."

The transaction in this case was not an assignment of certificates from Wallace to Miss Chapman,

he intended to give her the property. He claimed no interest in any portion of the moneys to be paid to Miss Chapman by the Realty Union for the property. The Realty Union did not obligate itself to pay him any portion of the moneys payable by it. It would have been quite a useless procedure, in view of the intentions of the parties, for Mr. Wallace to have made a deed to Miss Chapman, and then Miss Chapman deeding the property to the Realty Union. The fact that such formal steps of conveyance were not taken, would not defeat the vendor's lien.

The testimony of Mr. Wallace and Mr. Johnson shows that the transaction was arranged between Mr. Wallace representing the property and Mr. Johnson representing the Union. Mr. Wallace testified that he advised Miss Chapman to accept the proposition that he and Mr. Johnson had arrived at. Miss Chapman made objections, which objections Mr. Wallace stated, he had "rather to ignore." It appears that Mr. Wallace was fully advised of the character of the business conducted by the Realty Union, and he knew that the public generally had invested large sums with the Realty Union, without security, and to which investors had been issued the investment certificates. He knew that the ability of the company to pay these certificates at maturity depended upon the success of its scheme of operation and that such scheme contemplated the acquiring of real property to be sold at a profit. Mr. Wallace testified that he was quite sure he explained to Miss Chapman the nature of the certificates, and Mr. Johnson testified that he read over to her the certifi-



cates and explained to her that in the one case she owned a specific piece of property which might not increase in [172] value, but when she takes a certificate, she has an interest in all the company's properties, that therefore, there is a large chance of an increase of value because if one piece does not increase, another piece will.

Miss Chapman also testified that she noted the provision in the certificate that "Whenever the dividends paid its capital stockholders exceeded six per cent per annum, the rate of interest paid herein for the same period shall be increased to equal the rate of said dividends," but that she thought the dividends would not amount to anything. It might simply increase her interest, that instead of six per cent, they might be able to pay her seven per cent. She further testified that she understood that if the company made money, it would make it by buying and selling real estate. She further testified to the effect that she expected the company would sell the property she conveyed to it if they could do so to advantage.

In the case of *Claiborne against Castle*, 98 Cal. Rep. page 33, it was held that the vendor's lien, sec. 3046 of the Civil Code, is but a repetition of the common law and that under sec. 5 of the Civil Code it must be construed as a continuation thereof and not as a new enactment; "and that it is settled beyond dispute that the acts of a vendor which indicate a waiver of the lien may be shown by parol."

Counsel for the Trustee in his brief has cited a number of cases which in my opinion sustain his principal contentions, particularly the points made in

subdivision 2 commencing at page 14 of his brief and subdivision 4, page 23.

The transfer of the property to the company without restriction upon its resale, the vendee accepting investment certificates for the balance of the purchase price, with the knowledge that others had invested money with the corporation receiving only its certificates and that the company would continue [173] to receive investments from others, issuing to such investors like certificates, without security, the repayment of which investment certificates depended upon the ability of the company to bring to a successful conclusion its real estate transactions, which necessitated the resale of its properties, was inconsistent with the retention of a vendor's lien as against other investors both past and future.

The language used by the Court in the case of *Royal Consolidated Mining Co. vs. Royal Consolidated Mines*, 157 Cal. 737, I deem applicable here "The contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties."

I found that the property was conveyed to the company as an investment in its certificates. A claim upon such investment stands in the same condition as the claims of those who have advanced money to the corporation and received therefor its investment certificates.

As to the provisions for the exchange of certificates for property which the company might list for sale, without obligation on part of certificate holders to do so, it is my opinion that if a vendor's lien other-

wise existed that this provision could not be deemed the taking of security, and that the claim would still be a claim for the balance of the purchase price unsecured except by personal obligation of the buyer.

The following is a summary of the testimony:

WILLIAM C. WALLACE testified that he conducted negotiations with reference to the sale of the property in question, that the property was originally his; that he has transferred it in two parcels, the greater part belonged to Miss Chapman and he still retained a portion; that the property had been a long time under two mortgages and a deed of trust for money borrowed by him and for [174] which Miss Chapman had received no benefit; that he felt incumbent on him to do whatever was necessary to protect the property in connection with the mortgages; (page 66) that a foreclosure proceeding had been commenced by Mrs. Gardner of Oakland on a note for \$5,000; that he applied to Mr. Whitehead, who had been with the Realty Syndicate as agent and who was a stockholder in a number of banks, to help him out; that he, the witness, was one of the founders of the Realty Syndicate; that he offered to recompense Mr. Whitehead by giving him his equity in the property which he figured at \$2,000 if Mr. Whitehead would take whatever steps might be necessary to prevent the sacrifice of the property, that the matter was held in abeyance about 60 days before he came to a settlement, and in the meantime he had known about the Realty Union and that he offered Mr. Johnson (of the Realty Union) a proposition that if he would purchase the property for the Union

at a price to be agreed upon as fair and would furnish money enough to pay off the indebtedness, the owners of the property,—“and I assumed to act for Miss Chapman because she was a part owner in the property, though she was not involved in the difficulties therein”—“that we would accept for the balance of the payment the certificates of the Realty Union.” The thing figured out to the leaving of a balance of \$19,700.16 over and above the obligations which were deducted from the flat price that had been put upon it by the Realty Union or by Mr. Whitehead as coming to him. The Realty Union gave these certificates for the \$19,000. Those were made out to Miss Chapman, because it represented the value of her property. What was coming to him (Wallace) over and above the obligations, went to Mr. Whitehead as reward for “pulling us out of the hole.” That Miss Chapman became the owner of the property by deed of conveyance from him, and the consideration was love and affection; they were engaged to be married, at that time, and “it seems to be quite a sufficient consideration”; that he had no equity in the property after the conveyance; that he [175] knew the character of the business conducted by the Realty Union; that he was familiar with the character of the certificates issued by the Realty Union; had seen and read them; that during negotiations with the Realty Union he could not say he had consulted Miss Chapman,—“I think rather I took charge of the negotiations pretty much all myself, because it seemed to me to be the only thing to be done”; that he had made some inquiry



as to the assets and condition of the Realty Union and was satisfied that their assets were sufficient to leave them in a sound position at that time; (page 70) that he thinks that he expressed an opinion concerning the matter to Miss Chapman; that the opinion was that the company was certain to succeed to liquidate its indebtedness, including its certificates, according to their terms; (page 71) that "I advised her to accept the proposition which Mr. Johnson and myself, he representing the Realty Union and I representing the property, had arrived at with reference to this settlement of my embarrassment and the payment of the balance; that "I think she demurred considerably to it. My impression is that I had to persuade her a little bit. Perhaps I had rather to ignore her objections. That is my recollection; because I knew there was some little feeling grew out of it." I am quite sure that I explained (to Miss Chapman) the nature of the certificates; explanation was based upon the knowledge that I had acquired with the Realty Syndicate, which I had helped to promote, being one of the directors of the Syndicate and an officer of it; and I had remodeled the certificate over and over again and we had got them into shape, such shape that we thought was explicit in the language that we wanted to convey, and Mr. Johnson I think copied the form letter for letter"; that Miss Chapman knew he was conducting negotiations prior to the time they were closed; (page 72) that I think as near as I can recollect, that I told her (Miss Chapman) that the concern was expending money received from the investors in such a way that it was not in-

juring its solvency [176] nor its ability to meet its obligations when they should become due; investing in real estate, which is the only thing its charter permitted it to buy. Question by Mr. Aydelotte: "Then, as I understand, Mr. Wallace, the Realty Union agreed to pay the liens and taxes and encumbrances upon the property, and \$19,700 and some odd dollars, the \$700 and some odd dollars in money and the other \$19,000 represented by these certificates which I denominate promissory notes, is that right? A. Well, put the word 'certificates' in, yes, that was the understanding. They didn't say anything about promissory notes. That is a matter of opinion" (page 78). Q. I very adroitly put the question in that way, which I denominate "promissory notes"? A. Yes, I will say yes to that (page 79).

Counsel for the Trustee interrogated the witness as to information he had given to Miss Chapman concerning the business of the Realty Syndicate with which he was formerly connected. The referee asked the following question: "Mr. Wallace, was anything said to Miss Chapman about the fact that the certificates of the Realty Union, and their method of operation, including the exchange or the right to select real property in payment of these certificates, was similar to that of the Realty Syndicate? A. I would have to say no to the question as a whole, because I never—the similarity that I may have called attention to was with reference merely to the obligations and its interest-bearing features. I never contemplated the exchange of realty, because I never anticipated that and never knew it to be done up to that

time by the Realty Syndicate, of my own knowledge" (page 81).

HATTIE HARDESTY CHAPMAN.

Hattie Hardesty Chapman testified as follows:

Mr. Aydelotte produced a letter of which the following is a copy (page 3): [177]

"San Francisco, California, June 13, 1913.  
Miss Hattie H. Chapman,  
No. 2225 Pacific Avenue,  
Alameda, California.

My dear Madam: Herewith I enclose my check of \$729.36, being the remainder of the amount due to you from the purchase of your property on Telegraph Avenue in Oakland. The taxes and releases amounted to \$332.56. The amount paid to Mr. Dinkelspiel was \$971.00. The amount assumed at the Farmers & Merchants Savings Bank was \$3,192.08. The amount paid to Mr. Whitehead was \$11,000.00, which items, together with your certificates and the enclosed check, complete this transaction.

Yours truly,

ROOSEVELT JOHNSON."

The witness identified the certificates "petitioner's exhibits 2 and 3" as being the certificates referred to in said letter, and stated that she transacted her business with Roosevelt Johnson, who said he was the manager; main man of the Realty Union; that with reference to the time of payment the balance of \$19,000 on the property he told her that he would pay at the end of ten years and was going to pay six per cent interest, that they had it down that they would only pay them every six months and I said

I needed the money oftener than that, so I would rather have it every month; so he said he would do that; and that the certificate was changed from interest payable semi-annually to monthly, pursuant to such request.

Question by Mr. Clark: (Pages 6 and 7.) “Q. Did you consult anyone in connection with this transaction at all? A. Yes, I had a man that arranged the sale for me.

Q. Was he an attorney or a real estate dealer?

A. Well, he had been an attorney, but he was not practicing at that time.

Q. Who was that man? A. Well, he was a friend of mine. Do you wish me to tell the name?

Q. Well, I am not particular. But you did consult with that man who had had experience in real estate matters, did you, and a man who had had some experience in law matters? A. Yes, he was supposed to have. He had not been practicing for a good many years, though. [178]

Q. He was a man of about what age? A. I think he was about 52, perhaps.

Q. Did he put this deal through for you? That is, was it he who, so far as you were concerned, originated or arranged for this deal?

A. Well, he told me about it, and so I decided to do it. That was all. I went up to Mr. Johnson, Roosevelt Johnson, to sell him the property.

Q. Was this proposition your proposition or Roosevelt Johnson's proposition? Were you endeavoring to sell your real property? A. I had had no other offer for it, but I wanted to sell it, as it was encumbered,



and it was an expense to me, and I thought this was a good opportunity to sell it if he wanted to buy.

Q. Had you listed this property with the man to whom you refer, for sale, telling him that you would like to have him find some one who would take it off your hands? A. I don't know as I asked him that, but he knew it was kind of bothering me, keeping up the taxes and all that, and I wanted to get rid of it. And as it was a hard matter to sell property at that time, I was glad to see Mr. Johnson and talk about it.

Q. And you thought that this was a very favorable price, did you? A. I thought it was all right.

Q. Now, had you told this man that you would like to sell this property?

A. Had I told him that?

Q. Yes. A. No, I had not told him that.

Q. How did the Realty Union become acquainted with the fact that you were desirous of selling this property?

A. Well, I suppose they must have known it was a good piece of property, and they probably had their eye on it and they wanted it, and they probably found out who owned it.

Q. And did you read these certificates when you received them?

A. I think Mr. Johnson read them over to me.

Q. How long before that had it been suggested to you that you should [179] take these investment certificates? Right at the time when the proposition was first mentioned was it suggested that you take these investment certificates?

A. Why, I don't know when we discussed it. I told them what property it was and so they said they would pay me in those notes.

Q. Did they call them notes or did they call them realty investment certificates when they first mentioned them to you?

A. Well, they probably called them that, I guess. That is their title to show for what property they got.

The REFEREE.—Q. You mean the investment certificates?

A. I don't remember just what was said. It is kind of hard to remember"; that she spoke a number of times about the matter to the *gentlemen* who was advising her (page 9); that she remembered that the certificate contained a promise to pay something in the way of dividends in the event that the dividends of this company exceeded a specified amount (page 9); that "I didn't think that the dividends would amount to anything, particularly to me, because I thought, well, if they had to make money, why, it would simply increase my interest"; that instead of getting six per cent they might be able to pay me seven per cent; something like that; that she understood that if the company made money it would make it by buying and selling real estate (page 10).

Respecting the piece of property sold by her she stated: "Well, I supposed they would try to sell it and I expected them to pay me for it.

Q. There was no restriction put by you at the time of these negotiations, upon them, in the nature of a

provision against their selling or dealing with this particular piece of property that you turned over to them? A. Why, no; I didn't care how they got me my money as long as they kept their word and paid me the money they owed me (page 11).

Q. You didn't expect that this particular piece of real property [180] would be reserved in any way, did you, and treated by them any differently than any other piece of real property which they might hold? A. I didn't think anything about it. I just sold them the property. And they expected to get me the money in ten years and to pay me my interest regularly. They paid me the interest up to a certain time, and then they stopped."

The witness' attention was called to the clause in the certificate: "Any owner of investment certificates of a paid-up value not less than \$100 may exchange them for unimproved realty held for sale by the corporation and was asked: You understand the meaning of a simple clause in that certificate, don't you? A. I guess I did, I didn't think much about it, though."

The witness was questioned concerning the investment certificates and the issuance of the same by the Realty Union and she answered that she supposed they had been dealing with other people in the same method as they had with her and supposed they had other certificates outstanding (page 13); and further testified that she told her attorney to find out whether the Realty Union had any unimproved property that she could change these certificates for (page 14). This was after the company had defaulted in its

interest payments. Question by Mr. Clark (pages 15 and 16):

“Q. You understood that. So far as the Realty Union was concerned and what they stated they would be willing to do, was not the proposition from the very outset that they would satisfy your demand to the extent of \$19,000 altogether with certificates, investment certificates? A. What did those certificates mean to me? They meant only that they were going to pay me so much money, didn’t they? What did I want of their little certificates? They didn’t mean anything to me except that they promised to pay me so much. It was \$19,000. I didn’t care about their little certificates. I only wanted their money. That is the way I had of their putting it down, to show me when they would pay it. So I took [181] their certificates. Otherwise they would not appeal to me. Would they appeal to you? I didn’t want to frame them.

Q. At that time they might have appealed to me.

A. They didn’t to me.

Q. What I mean is this: They never at any time said to you that they would pay you \$19,000 in cash and assume this mortgage?

A. They certainly did. Mr. Roosevelt Johnson said they would pay me \$19,000 at the end of ten years, and he issued those ten-year certificates bearing six per cent interest every month.

Q. Did he state that this, however, would be paid only in investment certificates? Didn’t he say that?

A. No, he told me he would pay me in hard cash. He didn’t say anything about investment certificates.



Q. Did he state that so far as the company was concerned, that the only way in which the company could satisfy this demand at the present time was by giving investment certificates?

A. He said he could not pay me the money now, but he would give me these papers, or whatever you call them, and he would give me my money at the end of ten years."

At page 19 she further testified concerning exchanging certificates for real property; that she requested her attorney to get a list of the properties they had to exchange; she wanted to see what they had; if they had anything very fine she might have considered it but that she did not consider it.

In reply to the question by Mr. Aydelotte the witness testified that at the time of receiving the certificates, Mr. Johnson had told her that this was valuable property, referring to the property sold to the Realty Union, and we were going to hold that to the very last because it would increase in value (page 26). She testified that she called upon Mr. Johnson with reference to exchanging her certificates for property and that Mr. Johnson stated he would advise her not to do so because if we stick together we [182] would pull through all right (page 26).

Question by Mr. Clark: "Q. Well, did you expect, when he told you that, that if it increased in value so that there was a chance for a selling of it at a good profit, that they would sell it at a good profit?

A. Why, sure they would have. That is business, isn't it?" Upon being asked what brought to her mind the advisability of turning in the certificates

for unimproved property she answered: "Well, if I could not get my interest, why then I suppose I commenced to worry about it"; and further stated that she wanted to get this property back that she had sold them and that Mr. Johnson said he was going to give her a mortgage on it (page 32); that if she could have found good property she would have exchanged certificates for it; that she had asked her attorney about it a half dozen times if he had gotten the list yet referring to the list of property of the Realty Union for the purpose of exchange (page 33).

W. M. AYDELOTTE.

Mr. W. M. Aydelotte, attorney for the claimant, testified that he made a half a dozen trips to the office of the Realty Union and had conversations with Mr. Johnson relative to a compromise settlement of this whole affair; that Mr. Johnson proposed we accept a note and a mortgage due in three years on this identical property. He claimed the property was worth some more, was worth some \$50,000 or \$60,000; that he asked if Mr. Johnson would let him have some lists of various properties which they had for sale and that he would look over them and if he could make an adjustment satisfactory to Miss Chapman he would see what could be done; that Mr. Johnson told him the condition of the Realty Union and that it was in a bad way (page 43).

ROOSEVELT JOHNSON.

Mr. Roosevelt Johnson testified that he is vice-president and [183] manager of the Realty Union; that Mr. Wallace first spoke to him about

the transaction in question. The witness related the transactions had with Mr. Wallace and with Mr. Whitehead and that Mr. Wallace arranged with him to buy the corner at a certain price (page 55), and mentioned the encumbrances upon the property and the disposition made of such indebtedness. He further testified that he acquainted Miss Chapman and also Mr. Wallace as to the affairs of the Realty Union; that Mr. Wallace was directly familiar with the affairs of the company; that he showed Mr. Wallace a financial statement of the company showing the amount of obligations and character of obligations, the amount of assets and character of the assets; that he gave all that information to Miss Chapman and to Mr. Wallace; that he showed Miss Chapman that in one case she owned a specific piece of property which may not increase in value but when she takes a certificate she has an interest in all our properties, scattered over a large district, therefore, there is a large chance for an increase in value, because if one piece does not increase another piece will; that Miss Chapman was familiar at that time with the fact that the Realty Union owned a great many properties, for I showed her that our holdings covered a large distribution; "This took place at the close of the transaction" (page 56), that he remembered reading the certificates to Miss. Chapman (page 57), that he showed her the amount of outstanding certificates which at that time was \$600,000 (page 58), that with reference to the certificates Miss Chapman wanted to know the shortest terms she could get, that he told her ten years (pages

57-58). Referring to Mr. Aydelotte, he testified Mr. Aydelotte asked him for a list of properties; that the first time he heard of a vendor's lien respecting Miss Chapman's property was after Miss Chapman commenced her suit (pages 59-60); (in the State court) referring to the conversation as far as he could recollect was that Mr. Aydelotte called for the purpose of getting for Miss Chapman something more [184] definite as security than the certificates, that he asked for a list of land not encumbered, that he told Mr. Aydelotte that if he would wait until he could make a good sale "we could pay off those mortgages and then I will give you clear land" (page 63).

Counsel for the Trustee sought to introduce evidence concerning the character of business conducted by the Realty Syndicate for the purpose of showing that a similar method of conducting business was followed by the Realty Syndicate, that Mr. Wallace was, as an officer of that corporation, familiar with the same.

The referee sustained objections to this testimony but counsel was permitted to make the same of record. I do not deem it necessary to review this testimony for the reason that I consider it unimportant. It appears that Mr. Wallace was thoroughly familiar with the character of the business conducted by the Realty Union and as far as Miss Chapman is concerned it appears from Mr. Wallace's testimony that Miss Chapman was advised that Mr. Wallace had been connected with the Realty Syndicate, but it also appears that her knowledge of the character of



the business conducted by the Realty Syndicate so far as she had been advised by Mr. Wallace, was of an indefinite character (page 43).

Mr. Johnson further testified that in June, 1912, there was outstanding in paid-up certificates of the Realty Union about \$600,000; that after June, 1912, more than \$100,000 was issued, that the only way the company would have derived anything in the way of dividends or profits would have been by selling its real estate, and they began selling about June, 1914; that the business of the Realty Union practically amounted to acquiring tracts of real property around Oakland and Berkeley, and holding the real property and selling it off at a profit (pages 10-11, Supplemental Testimony). Mr. Johnson identified an official statement of the Realty Union of June 29th, 1912, which showed that the concern had received from [185] investors \$457,038.19 in payment of investment certificates. He identified a financial statement of December 31, 1912, which showed received of investors \$550,484.69. It was this statement he said that he referred to when he said that the amount received from investors was approximately \$600,000. He identified a financial statement dated December 31st, 1914, in which statement under the heading of liabilities is shown "received from investors, \$858,769.76" and also one of December 31st, 1913, showing \$774,012.30 received from the investors. His attention was called to a statement of June 29th, 1912, under the heading of assets, "realty, \$1,039,009.65," he testified that this

realty was bought by cash, certificates and other securities.

FRANK A. GRACE.

Mr. Frank A. Grace testified that he had been connected with the Realty Syndicate, that he afterwards became connected with the Realty Union, and that the certificates of the Realty Union are approximately the same as the Realty Syndicate, because he used the Realty Syndicate plates and only made a few minor changes.

It was stipulated that Mr. Grace would testify the same as Mr. Johnson respecting the character of the business of the Realty Syndicate (page 15, Sup. Test.).

It was stipulated that the by-laws of the Realty Union contained the following provision: "Any owner of investment certificates may apply the amount paid thereon, on account of the purchase of unencumbered realty held for sale by the corporation" (page 15, Sup. Test.).

Commencing at page 17 in the Supplemental Testimony, certain stipulations are recited concerning the record title of this property and the encumbrances thereon existing from time to time.

Dated: June 28th, 1917.

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy. [186]

PAPERS TRANSMITTED HEREWITH.

Transcript of Testimony and Supplemental Transcript.

Order to Show Cause on Petition to Sell Real Property.

Answer of Hattie Hardesty Chapman to Petition for Order to Sell.

Answer and Amended Answer of Trustee to the Claim of Hattie Hardesty Chapman.

Brief of Trustee.

Miss Chapman's Closing Brief.

Order Disallowing Claim to Vendor's Lien.

Petition to Review.

Petitioner's Exhibits Nos. One to Six.

[Endorsed]: Filed at 3 o'clock P. M. Jun. 27, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [187]

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(Title of Court and Cause.)

**Opinion and Order Affirming Order of Referee.**

WM. W. AYDELOTTE and C. A. S. FROST, for the Petitioner.

R. H. CROSS, J. A. ELSTON and BLACK & CLARK, for the Trustee.

RUDKIN, District Judge.

This is a proceeding to review an order of the referee disallowing a claim to a vendor's lien on certain real property heretofore conveyed to the bankrupt by the petitioner and one William C. Wallace. The facts are fully set forth in the certificate of the referee and will not be repeated here.

The claim of lien is based on section 3046 of the Civil Code of California, which provides:

"One who sells real property has a vendor's lien

thereon for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

The claim of lien is resisted by the trustee on three grounds: First, because the property was not conveyed to the bankrupt by the petitioner; Second, because security was taken for the payment of the purchase price; and Third, because there was an implied waiver of lien.

The first objection urged by the trustee is not well taken.

"We do not think that it is in all cases indispensable that the legal title shall have been vested in the party who claims the lien, nor that a deed or conveyance should have been actually executed by him. If he is the owner of the land in equity and controls the legal title, and if he causes the conveyance to be made, and is entitled to the purchase money, he is entitled to the vendor's lien therefor." *Loomis vs. Davenport & St. P. R. Co.*, [188] 17 Fed. 301. The facts in this case bring the petitioner within the rule there announced.

The claim that the purchase money was secured is based on the provisions of the investment certificates executed in consideration of the balance due on the purchase price. The first of these certificates for ten thousand dollars, reads as follows:



"No. 10219.

E.

\$10000

Investment Certificate,  
issued by

**THE REALTY UNION**

Incorporated 1910, under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN of Alameda, California, TEN THOUSAND DOLLARS with interest at the rate of six per cent. per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent. per annum, the rate of interest paid thereon for the same periods shall be increased to equal the rate of said dividends.

6%

GOLD

6%

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid-up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President or Vice-president and by its Secretary and countersigned by its Auditor at its office in the City and County of San Francisco, State of California, this sixth day of June, 1912.

**ROOSEVELT JOHNSON,**

Vice-president.

(Corporate Seal)

**JESSE B. FULLER,**

Secretary.

Countersigned by

G. W. FANNING, Auditor.

**UNITED STATES OF AMERICA."**

The second certificate is in all respects similar to the first except the amount, which is nine thousand dollars.

The claim that the purchase price was secured is based upon the provision of the investment certificate that,

“Any owner of investment certificates of a paid-up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the corporation.” [189]

Assuming that this provision has any validity by reason of its uncertainty, the most that can be claimed for it is that it provides another means of payment and that, of itself, will not defeat the lien.

Brisco vs. Minah Consol. Min. Co., 82 Fed. 952.

I am constrained to hold, however, that a vendor's lien does not exist under the facts disclosed by this record. The Statute in question is declaratory in its nature and the lien there referred to is the lien long recognized by the Chancery Courts. In *Johnson vs. McKinnon*, 45 Fla. 358, that lien is defined as follows:

“The vendor's lien is that lien which in equity is implied to belong to a vendor for the unpaid purchase price of land sold by him where he has not taken any other lien or security for the same, beyond the personal obligation of the purchaser. Such lien is not the result of any agreement between vendor and vendee but is simply an equity raised by the courts for the benefit of the former, by whom it will

be enforced or denied between the parties, as the exigencies of each particular case may seem to require.”

In 39 Cyc. 1787, it is said:

“A vendor’s implied lien, as distinguished from a lien expressly reserved, or from the security which the vendor has, while he holds the legal title under an unexecuted contract to convey, is the equitable right, which by implication is accorded to one who has conveyed the title to land without reserving a lien thereupon, and has taken no security for the purchase money other than the personal obligation of the purchaser, to subject the land in equity to the payment of the purchase price, when the rights of others are not injured and it is equitable so to do.

This lien does not grow out of an agreement between the parties but is simply an equity raised by Courts of Chancery for the benefit of vendors of realty, which will be enforced or [190] denied as the exigencies of each particular case may require.”

The assertion of a vendor’s lien in this case is utterly inconsistent with the purposes for which the property was conveyed. The holders of all certificates were contributors to a common fund to be used and managed for the common benefit of all and persons who contributed real property in consideration of the receipt of such certificates occupy no more favorable positions in equity than those who contributed cash.

To allow the assertion of the lien here would destroy all equality between the different investors and would be inequitable in the extreme, especially in view of the fact that the moneys received from other

investors have no doubt been used to discharge the numerous liens existing against the property at the time the conveyance was made.

The order of the referee is therefore affirmed.

RUDKIN,  
Judge.

[Endorsed]: At 10 o'clock and 30 min. A. M. Aug. 4, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [191]

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(Title of Court and Cause.)

**Petition for Appeal by Hattie Hardesty Chapman.**

The above-named Hattie Hardesty Chapman feels herself aggrieved by the Decree and Order made and entered on August Fourth, Nineteen Hundred Seventeen, in the above-entitled cause; and does hereby APPEAL from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and she prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 14, 1917.

WM. M. AYDELOTTE,  
W. F. SULLIVAN,  
C. A. S. FROST,

Attorneys for Hattie Hardesty Chapman.



Receipt of a copy of the foregoing Petition this 14th day of August, 1917, is admitted.

R. H. CROSS,  
BLACK & CLARK,  
J. H. ELSTON,

Attorneys for R. M. Sims, Trustee Herein.

[Endorsed]: Filed at 2 o'clock and 15 min. P. M.  
Aug. 14, 1917. W. B. Maling, Clerk. By C. M.  
Taylor, Deputy Clerk. [192]

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(Title of Court and Cause.)

**Assignment of Errors on Appeal of Hattie Hardesty  
Chapman.**

Now comes Hattie Hardesty Chapman, plaintiff and claimant in the above-entitled cause and proceeding, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and decree of said District Court, made and entered August 4th, 1917, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "I" of the Petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overruling the exceptions of said Hattie Hardesty Chapman

to said referee's report, as specified and contained in said paragraph numbered "I."

2. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "II" of the petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "II."

3. In holding that the evidence adduced before the referee herein is sufficient to justify the findings of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph [193] numbered "III" of the petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "III."

4. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "IV" of the petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overrul-

ing the exceptions to said referee's report as specified and contained in said paragraph numbered "IV."

5. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VI" of the petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "VI."

6. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VII" of the petition of said Hattie Hardesty Chapman herein to review the order of said referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "VII."

7. That said District Court erred in holding that said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's [194] lien upon the property, or upon any of the property mentioned in her complaint herein.

8. That said District Court erred in holding that said Hattie Hardesty Chapman waived her vendor's

lien upon said real property.

9. That said District Court erred in concluding that the plan and arrangement whereby said Investment Certificates were issued was inconsistent with the retention by said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time said Investment Certificates mentioned in said complaint were issued to said Hattie Hardesty Chapman.

10. That said District Court erred in holding that said Hattie Hardesty Chapman is not entitled to a vendor's lien, and that she has no vendor's lien, upon said real property; and in holding that said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

11. That said District Court erred in holding that the prayer of plaintiff's complaint (the complaint herein of said Hattie Hardesty Chapman), be denied.

12. That said District Court erred in giving and making said order and decree August 4th, 1917, in that said order and decree is against law.

WHEREFORE, said Hattie Hardesty Chapman prays that the order and decree of said District Court of the United States, given August 4th, 1917, herein, be corrected and reversed.

August 14, 1917.

WM. M. AYDELOTTE,  
C. A. S. FROST,  
WILLIAM F. SULLIVAN,  
Attorneys for Hattie Hardesty Chapman.



Receipt of a copy of the foregoing assignment of errors this 14th day of August, 1917, is admitted.  
[195]

R. H. CROSS,  
BLACK & CLARK,  
J. H. ELSTON,

Attorneys for R. M. Sims, Trustee in Bankruptcy of  
The Realty Union, Bankrupt, Herein.

[Endorsed]: Filed at 2 o'clock and 15 min. P. M.  
Aug. 14, 1917. W. B. Maling, Clerk. By C. M.  
Taylor, Deputy Clerk. [196]

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(Title of Court and Cause.)

**Order Granting Appeal and Allowing Supersedeas.**

Hattie Hardesty Chapman, plaintiff and claimant in the above-entitled cause and proceeding, having heretofore filed herein her Petition for Appeal and her Assignment of Errors, said Appeal is **ALLOWED**. Said Appeal is to operate as a supersedeas of the order and decree appealed from upon said Hattie Hardesty Chapman giving bond in the sum of One Thousand (\$1,000) Dollars.

Dated August —, 1917.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed at 2 o'clock and 15 min. P. M.  
Aug. 14, 1917. W. B. Maling, Clerk. By C. M.  
Taylor, Deputy Clerk. [197]

(Title of Court and Cause.)

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, That we, Hattie Hardesty Chapman, as principal, and United States Fidelity & Guaranty Company, a Corporation of the State of Maryland, as surety, are held and firmly bound unto R. M. Sims, Trustee in Bankruptcy of The Realty Union, a corporation, in the full and just sum of One Thousand (\$1000) Dollars to be paid to the said R. M. Sims, Trustee in Bankruptcy of The Realty Union, a corporation, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of August, in the year of our Lord One Thousand Nine Hundred and Seventeen.

Whereas, lately, at the District Court of the United States for the Northern District of California, in a suit or proceeding depending in said court between Hattie Hardesty Chapman, plaintiff, and R. M. Sims, Trustee in Bankruptcy of The Realty Union, a corporation, Bankrupt, in the proceedings in the caption hereof entitled, a decree was rendered against the said Hattie Hardesty Chapman, and the said Hattie Hardesty Chapman having obtained an Appeal and filed a copy thereof in the clerk's office of the said court, to reverse the decree aforesaid, and a citation directed to the said R. M. Sims, Trustee of

the said The Realty Union, a corporation, Bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, within thirty days from the date hereof.

NOW, the condition of the above obligation is such that if the said Hattie Hardesty Chapman shall prosecute her appeal to [198] effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Hattie Hardesty Chapman, as principal, has hereunto subscribed her name and affixed her seal, and the United States Fidelity & Guaranty Company, has caused its name to be hereunto subscribed and its seal hereunto affixed by its Attorneys in Fact thereunto duly authorized the day and year first above written.

HATTIE HARDESTY CHAPMAN,  
Principal.

Witness to signature of Hattie Hardesty Chapman:

W. E. TOMS.

UNITED STATES FIDELITY & GUAR-  
ANTY CO.

By WILL LOVE,

By W. S. ALEXANDER,

Attorneys in Fact.

[Seal U. S. Fidelity & Guaranty Co.]

Approved:

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed at 2 o'clock and 15 min. P. M.  
Aug. 14, 1917. W. B. Maling, Clerk. By C. M.  
Taylor, Deputy Clerk. [199]

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(Title of Court, Cause and Number.)

**Stipulation for Use of Original Exhibits Upon  
Appeal.**

It is hereby stipulated by and between the attorneys for the above-named parties that in making up the transcript of the record on appeal the clerk may omit the exhibits introduced in evidence at any and all hearings of the above-entitled matter on behalf of said parties hereto and may transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit in San Francisco, Cal., the original exhibits in lieu of copying same in the record.

Dated: October 9, 1917.

WM. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,  
Attorneys for Plaintiff and Appellant.

J. A. ELSTON,  
BLACK & CLARK,  
R. H. CROSS,  
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Oct. 11, 1917, at 2 o'clock and  
30 min. P. M. W. B. Maling, Clerk. By C. M.  
Taylor, Deputy Clerk. [200]



(Title of Court, Cause and Number.)

**Stipulation for Diminution of Record.**

It is hereby stipulated and agreed by and between the attorneys for plaintiff and appellant and defendant and appellee hereinabove named that the clerk of the above-entitled court in following the praecipe for transcript of the record on file herein may omit the full title of the court and cause, except upon the Praecipe, and thereafter refer to same simply as "title of court and cause."

It is further stipulated that the clerk may omit all verifications and refer to same as "duly verified."

Dated October 9, 1917.

WM. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,

Attorneys for Plaintiff and Appellant.

J. A. ELSTON,  
BLACK & CLARK,  
R. H. CROSS,

Attorneys for Defendant and Appellee.

[Endorsed]: Filed Oct. 11, 1917, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [201]

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(Title of Court, Cause and Number.)

**Stipulation for Diminution of Record (Re Trustee's  
Petition for Sale).**

That whereas, in the petition for order of sale filed

herein by R. M. Sims, Trustee in Bankruptcy of The Realty Union, a corporation, Bankrupt, certain paragraphs, to wit:

Paragraphs 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, subdivisions lettered (a), (b), (c), (d), (f-1), (f-2), and (G) under subheading "Trust Deeds" in paragraph 25, and subdivisions lettered (i), (j), (K-1), (K-2) and (1) under subheading "Mortgages" in said paragraph 25, paragraph numbered 27, and the Exhibits numbered respectively "Parcel 1," 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38(1), 38(2), 38(3), 38(4) "Parcels 38-1, 38-2, 38-3, 35, are all irrelevant to the case of appellant herein and concern land in which appellant herein, Hattie Hardesty Chapman, has no interest.

Therefore, it is hereby stipulated and agreed by and between the attorneys for plaintiff and appellant and defendant and appellee hereinabove named that the clerk of the above-entitled court in making up the transcript of the record on appeal in the above-entitled cause, may omit from the pleading filed on the part of R. M. Sims, Trustee in Bankruptcy of the said The Realty Union, a corporation, Bankrupt, entitled "Petition for Order of Sale," each and every of the paragraphs and parcels and exhibits specified hereinabove and shall include in the said transcript only the following paragraphs and exhibits viz. paragraphs numbered "1," "2," "7," "9½," "24," "25" down to and including the subheading "Trust Deeds" and subdivision lettered

“E” under said subheading “Trust Deeds” and [202] subdivision lettered “H-1” and subdivision lettered “H-2” under subheading “Mortgages” in said paragraph numbered “25,” paragraph numbered “26,” paragraph numbered “28” and the Prayer of said petition and the exhibits numbered “Parcel 30” and “Parcel 81” attached to said petition, and may omit from said petition for order of sale all the rest and remainder of the said petition and of the exhibits attached thereto. Upon demand and at appellee’s election appellant will print and file any portion of the record so omitted and hereby consents to an order to the foregoing effect.

Dated October 29, 1917.

WM. AYDELOTTE,

C. A. S. FROST,

W. F. SULLIVAN,

Attorneys for Plaintiff and Appellant.

J. A. ELSTON,

R. H. CROSS,

BLACK & CLARK,

Attorneys for Defendant and Appellee.

[Endorsed]: Filed Oct. 31, 1917, at 11 o’clock and 30 min. A. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [203]

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(Title of Court and Cause.)

**Stipulation and Order Extending Time to File  
Record and Docket Cause to and Including  
October 30, 1917.**

It is hereby stipulated and agreed by and between

the respective attorneys for the appellant and appellee hereinabove named, that the time within which said appellant shall prepare, serve and file her transcript on appeal herein may be and is hereby extended to and including the 13th day of October, 1917.

Dated August 31, 1917.

WM. M. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,  
Attorneys for Appellant.

R. H. CROSS,  
J. A. ELSTON,  
BLACK & CLARK,  
Attorneys for Appellee.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the time within which said appellant shall serve and file her transcript on appeal herein be, and the same is, hereby extended to and including the 13th day of October, 1917.

Dated September —, 1917.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed at 10 o'clock A. M., Sep. 7, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [204]

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(Title of Court, Cause and Number.)

**Stipulation and Order Extending Time to File  
Record and Docket Cause to and Including  
November 13, 1917.**

It is hereby stipulated and agreed by and between



the respective attorneys for the appellant and appellee hereinabove named, that the time within which said appellant shall prepare, serve and file her transcript on appeal herein may be and is hereby extended to and including the 13th day of November, 1917.

Dated October 2, 1917.

WM. M. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,  
Attorneys for Appellant.  
J. A. ELSTON,  
R. H. CROSS,  
G. CLARK,  
Attorneys for Appellee.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the time within which said appellant shall serve and file her transcript on appeal herein be, and the same is, hereby extended to and including the 13th day of November, 1917.

Dated October 5th, 1917.

WM. W. MORROW,  
Judge.

[Endorsed]: Filed Oct. 5, 1917, at 2 o'clock and — min. P. M. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [205]

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**Certificate of Clerk U. S. District Court to  
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of Cali-

fornia, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of The Realty Union, a Corporation, Bankrupt, No. 9510, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Praeceptum" (copy of which is embodied in this transcript), and the instructions of the attorneys for claimant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of —, and that the same has been paid to me by the attorneys for appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein, page —.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of November, A. D. 1917.

[Seal]

WALTER B. MALING,  
Clerk.

By C. M. Taylor,  
Deputy Clerk.

CMT. [206]

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 9510.

In the Matter of THE REALTY UNION, a Corpora-  
tion,

Bankrupt.

In the Matter of the Application of the Trustee to  
Sell Real Property of the Estate of the Bank-  
rupt Free and Clear From all Encumbrance,  
etc.

HATTIE HARDESTY CHAPMAN,

Plaintiff,

vs.

R. M. SIMS, Trustee in Bankruptcy of THE  
REALTY UNION, a Corporation,

Bankrupt.

**Citation on Appeal.**

To R. M. Sims, Trustee in Bankruptcy of The Realty  
Union, a Corporation, Bankrupt, GREETING:

WHEREAS, Hattie Hardesty Chapman, claimant  
and plaintiff in the above-entitled cause and proceed-  
ing, has lately appealed to the United States Circuit  
Court of Appeals for the Ninth Circuit, from an  
order and decree lately, and on August 4th, 1917,  
rendered in the District Court of the United States  
for the Northern District of California, First Divi-  
sion, made in favor of said R. M. Sims, Trustee in  
Bankruptcy of The Realty Union, a corporation,  
Bankrupt; you are, therefore, hereby cited and ad-

monished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the said District, within thirty days from the date hereof, to do and receive what may appertain to justice to be done in the premises. [207]

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 14th day of August, in the year of our Lord Nineteen Hundred and Seventeen, and of the Independence of the United States of America, the One Hundred and Forty-first.

WM. C. VAN FLEET,  
Judge. [208]

[Endorsed]: No. 7867. In the District Court of the United States for the Northern District of California, First Division. No. 9510. In the Matter of The Realty Union, a Corporation, Bankrupt, etc., Hattie Hardesty Chapman, Plaintiff, vs. R. M. Sims, Trustee, etc., Defendant. Citation on Appeal. Filed At 9 o'clock and 30 min. A. M., Aug. 20, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

### **Return on Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on Appeal, on the therein named R. M. Sims, Trustee in Bankruptcy of the Realty Union, a Corporation, by handing to and leaving a true and correct copy thereof with R. M. Sims, Trustee in Bankruptcy of the Realty Union, a Corpora-



tion, personally at San Francisco, Calif., in said District on the 16th day of August, A. D. 1917.

J. B. HOLOHAN,

U. S. Marshal.

By J. Jessen,

Deputy. [209]

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[Endorsed]: No. 3077. United States Circuit Court of Appeals for the Ninth Circuit. Hattie Hardesty Chapman, Appellant, vs. R. M. Sims, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed November 10, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the United States Circuit Court of Appeals in and  
for the Ninth Circuit.*

No. 3077.

HATTIE HARDESTY CHAPMAN,  
Plaintiff and Appellant,  
vs.

R. M. SIMS, Trustee, etc.,  
Defendant and Appellee.

**Stipulation that Original Exhibits Need not be  
Printed in Transcript on Appeal.**

It is hereby stipulated by and between the attorneys for the above-named parties that in printing the transcript of the record on appeal herein, the clerk of the above-entitled court may omit from such transcript and shall not print therein any of the original exhibits introduced in evidence at any and all hearings of the above-entitled matter on behalf of the said parties hereto, providing appellant will print or provide for the court any thereof needed or requested by respondents.

It is further stipulated by and between the attorneys for the above-named parties that any and all of the said original exhibits shall be considered by the above-entitled court in all respects as if they had been printed in the said transcript on appeal.

Dated November 15, 1917.

WM. M. AYDELOTTE,  
C. A. S. FROST,  
W. F. SULLIVAN,  
Attorneys for Plaintiff and Appellant.  
R. H. CROSS,  
J. A. ELSTON,  
BLACK & CLARK,

Attorneys for Defendant and Appellee.

[Endorsed]: No. 3077. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Hattie Hardesty Chapman, Plaintiff and Appellant, vs. R. M. Sims, Trustee, etc., Defendant and Appellee. Stipulation that Original Exhibits Need not be Printed in Transcript on Appeal. Filed Nov. 17, 1917. F. D. Monckton, Clerk.

No. 3077

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

*Appellant,*

vs.

R. M. SIMS, Trustee in Bankruptcy of The  
Realty Union, a Corporation, Bankrupt,

*Appellee.*

## OPENING BRIEF FOR APPELLANT

W. F. SULLIVAN,  
C. A. S. FRÖST,  
WM. M. AYDELOTTE,  
*Attorneys for Appellant.*

Filed this.....day of February, 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The Myself-Rollins Bank Note Co.





No. 3077

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

*Appellant,*

VS.

R. M. SIMS, Trustee in Bankruptcy of The  
Realty Union, a Corporation, Bankrupt,

*Appellee.*

## OPENING BRIEF FOR APPELLANT

### Statement of the Case

This is an appeal from the order of the District Court of the United States for the Northern District of California, made and entered on the 4th day of August, 1917, affirming the order of the Referee in Bankruptcy, sitting in San Francisco, California, previously made, disallowing appellant's claim to a vendor's lien on certain real property hereinafter described.

Although there was a vast deal of irrelevant and immaterial testimony taken at the hearing in this matter before the Referee in Bankruptcy and a considerable reiteration of question and answer to and from the several witnesses called, which, be-

cause of counsel for respondent's request that all of the testimony be printed *verbatim*, has resulted in a bulky transcript of the record, the essential facts of the case are simple and may be stated in few words.

On or about June 6, 1912, an agreement of sale of real property was consummated between the appellant herein and The Realty Union, the corporation bankrupt herein, wherein and whereby appellant herein conveyed by good and sufficient grant, bargain and sale deeds to the said Realty Union, the following described pieces of real property, bounded and described as follows:

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at a point on the eastern line of Telegraph Avenue, as the same now exists, distant thereon northerly one hundred (100) feet from the point of intersection thereof with the northern line of 45th Street, formerly Linden Lane; running thence northerly along said line of Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches, more or less, to the northern line of the land heretofore conveyed by S. E. Alden to Annie Wallace; thence along said line north 84 degrees 15 minutes east one hundred and twenty-five (125) feet; thence south 12 degrees 30 minutes west [8] par-

allel with Telegraph Avenue one hundred and fifty-three (153) feet, eight (8) inches to a point on said line distant one hundred (100) feet northerly from the northern line of 45th Street; and thence south 84 degrees 15 minutes west one hundred and twenty-five (125) feet to the point of beginning.

Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta on file in the office of the County Recorder of Alameda County.

\* \* \* \* \*

All that lot of land situated in the City of Oakland, County of Alameda, State of California, bounded and described as follows, to wit:

Beginning at the point of intersection of the northern line of 45th Street, formerly called Linden Lane, with the eastern line of Telegraph Avenue, as said street and avenue now exist; running thence easterly along said line of 45th Street one hundred and twenty-five (125) feet; thence north 12 degrees 30 minutes east one hundred (100) feet; thence south 84 degrees 15 minutes west one hundred and twenty-five (125) feet to the eastern line of Telegraph Avenue; and thence southerly along said last-named line one hundred (100) feet, more or less, to the point of beginning.



Being a portion of Plot No. 35, as per Kellersberger's Map of the Ranchos of V. & D. Peralta, on file in the office of the County Recorder of Alameda County.

\* \* \* \* \*

The consideration for this sale of these pieces of property was the sum of \$35,255.00, payable as follows, viz.: \$729.36 payable in cash. \$15,495.64 tax liens, mortgages and other incumbrances on the property assumed and paid by the said Realty Union, and two promissory notes, each dated June 12, 1912, made by the said Realty Union in favor of the said Hattie Hardesty Chapman, payable ten years after date in Gold Coin, one in the sum of Ten Thousand Dollars, and the other in the sum of Nine Thousand Dollars, and each bearing interest from date until paid at the rate of six per cent per year, payable monthly.

The deal was finally closed and all the consideration paid on June 13, 1913.

(See Transcript, p. 49—Letter of Roosevelt Johnson, Manager and Vice President of Realty Union to Hattie Hardesty Chapman.)

These two promissory notes called by The Realty Union witnesses "Investment Certificates," are set out *verbatim* in Transcript, pp. 26-27.

The fact that The Realty Union witnesses and its counsel persist in calling these notes investment certificates does not, of course, alter their character as promissory notes.

The Realty Union paid the interest on these two promissory notes up to March 6, 1915, but has never paid any part of the principal and has paid no part of the interest due on said notes since that time.

On the 10th day of May, 1915, this appellant commenced an action in the Superior Court of the State of California, in the County of Alameda, against the said Realty Union, alleging its bankruptcy, to enforce her vendor's lien upon the property herein above described which was still in the possession of The Realty Union and always had been in the possession of The Realty Union as the legal holder and owner thereof since its conveyance to it by appellant herein. The Realty Union had, since such conveyance, mortgaged the property to the Hibernia Savings and Loan Society, but such mortgage transaction has no relevancy to this case.

Before this action could be brought to trial, The Realty Union was, on the 15th day of September, 1915, adjudicated a bankrupt, and R. M. Sims, defendant and respondent herein, was appointed Trustee in Bankruptcy of said Realty Union.

Subsequently, the said Sims petitioned the Court sitting in Bankruptcy for an order of sale of the

real property of the said Realty Union, including the property in question here, and the complaint of appellant filed in the above-named Superior Court was presented in the Bankruptcy matter in opposition to such petition, and by stipulation of the parties was made the basis of a claim for a vendor's lien and a preferred claim on the property in question in the said Bankruptcy matter. (Transcript, p. 47.)

After taking testimony and hearing argument of counsel, the Referee in Bankruptcy made a report disallowing appellant's claim of vendor's lien. (Transcript, pp. 194-218.)

This report was, on exceptions heard in the said District Court, affirmed.

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### **Specification of Errors**

Now comes Hattie Hardesty Chapman, plaintiff and claimant in the above-entitled cause and proceeding, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and decree of said District Court, made and entered August 4th, 1917, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "I" of the Petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions of said Hattie Hardesty Chapman to said Referee's report, as specified and contained in said paragraph numbered "I."

2. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "II" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "II."

3. In holding that the evidence adduced before the Referee herein is sufficient to justify the findings of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph [193] numbered "III" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee dis-



allowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "III."

4. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "IV" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "IV."

5. In holding that the evidence adduced before the referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evidence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VI" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said Referee's report as specified and contained in said paragraph numbered "VI."

6. In holding that the evidence adduced before the Referee herein is sufficient to justify the finding of said Referee in the particulars wherein said evi-

dence is alleged to be insufficient to justify said finding as specified in paragraph numbered "VII" of the petition of said Hattie Hardesty Chapman herein to review the order of said Referee disallowing her claim; and that said District Court erred in overruling the exceptions to said referee's report as specified and contained in said paragraph numbered "VII."

7. That said District Court erred in holding that said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's [194] lien upon the property, or upon any of the property mentioned in her complaint herein.

8. That said District Court erred in holding that said Hattie Hardesty Chapman waived her vendor's lien upon said real property.

9. That said District Court erred in concluding that the plan and arrangement whereby said Investment Certificates were issued was inconsistent with the retention by said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time said Investment Certificates mentioned in said complaint were issued to said Hattie Hardesty Chapman.

10. That said District Court erred in holding that said Hattie Hardesty Chapman is not entitled to a vendor's lien, and that she has no vendor's lien,

upon said real property; and in holding that said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

11. That said District Court erred in holding that the prayer of plaintiff's complaint (the complaint herein of said Hattie Hardesty Chapman), be denied.

12. That said District Court erred in giving and making said order and decree August 4th, 1917, in that said order and decree is against law.

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## ARGUMENT

Appellant's claim of vendor's lien is based primarily on Section 3046 of the Civil Code of California, which reads as follows:

“Lien of Seller of Real Property. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.”

This section of our State Code is simply declaratory of what has been the law, as administered in equity, for many years.

“Where a vendor delivers possession of an estate to a purchaser without receiving the purchase money, equity, whether the estate be or be not conveyed, and, although there was not any special agreement for that purpose, and whether the whole or only part of the money is unpaid, gives the vendor a lien on the land for the money.”

Sugden, Vendors and Purchasers, 8th Am. (Perkins) Edn., 1873, Vol. 2, p. 371.

Although we have set out herein all the Specifications of Error assigned by appellant (Transcript, pp. 248-251), we rely chiefly upon the following as specially calling the attention of this Court to the errors committed in the Court below, viz.:

7. That said District Court erred in holding that said Hattie Hardesty Chapman is estopped from claiming that she has a vendor's [194] lien upon the property, or upon any of the property mentioned in her complaint herein.

8. That said District Court erred in holding that said Hattie Hardesty Chapman waived her vendor's lien upon said real property.

9. That said District Court erred in concluding that the plan and arrangement whereby said Investment Certificates were issued was inconsistent with the retention by said Hattie Hardesty Chapman of any vendor's lien in, or any special claim to, the property transferred to said corporation at the time



said Investment Certificates mentioned in said complaint were issued to said Hattie Hardesty Chapman.

10. That said District Court erred in holding that said Hattie Hardesty Chapman is not entitled to a vendor's lien, and that she has no vendor's lien, upon said real property; and in holding that said real property is free from any claim of the said Hattie Hardesty Chapman whatsoever.

11. That said District Court erred in holding that the prayer of plaintiff's complaint (the complaint herein of said Hattie Hardesty Chapman) be denied.

12. That said District Court erred in giving and making said order and decree August 4th, 1917, in that said order and decree is against law.

These specifications are found on pp. 250-251 of Transcript.

Appellant's claim of vendor's lien is resisted by the Trustee on three grounds:

First, because the property was not conveyed to the Bankrupt by the petitioner.

Second, because security was taken for the payment of the purchase price; and

Third, because there was an *implied* waiver of lien.

The learned Judge of the District Court in his Opinion and Order affirming the Order of the Referee and disallowing appellant's claim of vendor's lien, holds that neither of the first two objections is well taken, citing the cases of *Loomis vs. Davenport and St. P. R. Co.*, 17 Fed. Rep. 301, and *Brisco vs. Mirah Consol. Min. Co.*, 82 Fed. Dep. 952, in support of his position, respectively, in the matter of these two objections. (Transcript, pp. 242-245.)

We most respectfully assent to and are satisfied with the learned Judge's Opinion on these two points but urge, most respectfully, that the learned Judge erred in holding that:

“The assertion of a vendor's lien in this case is utterly inconsistent with the purposes for which the property was conveyed. The holders of all certificates were contributors to a common fund to be used and managed for the common benefit of all, and persons who contributed real property in consideration of the receipt of such certificates occupy no more favorable positions in equity than those who contributed cash.

To allow the assertion of the lien here would destroy all equality between different investors, and would be inequitable in the extreme, especially in view of the fact that the moneys received from other investors have no doubt been used to discharge the numerous liens existing against the property at the time the conveyance was made.” (Transcript, pp. 246-247.)

In support of our contention that the Court below erred in drawing the above inference and conclusion from the evidence adduced in this case before the Referee in Bankruptcy and from the implication of law and fact to be drawn therefrom, we submit:

First: The testimony of appellant clearly shows that she considered the two promissory notes, or investment certificates, simply as the evidence of the Realty Union's indebtedness to her in the transaction in question; that she expected them to be paid in full with interest as agreed; that she had no intention of waiving any of her rights, and that she knew nothing of the general nature of the business of The Realty Union; or supposed, for a moment, that by accepting these "investment certificates" she embarked in any speculative scheme of The Realty Union.

In this behalf we quote from appellant's testimony (Transcript, pp. 66-68), cross-examination by Mr. Clark:

"Q. You understood that. So far as the Realty Union was concerned, and what they stated they would be willing to do, was not the proposition from the very outset that they would be willing to do, was not the proposition from the very outset that they would satisfy your demand to the extent of \$19,000 altogether with certificates, investment certificates?

A. What did those certificates mean to me? They meant only that they were going to pay me so much money, didn't they? What did I want of their little certificates? They [52] didn't mean anything to me except that they promised to pay me so much. It was \$19,000. I didn't care about their little certificates. I only wanted their money. That is the way I had of their putting it down, to show me when they would pay it. So I took their certificates. Otherwise they would not appeal to me. Would they appeal to you? I didn't want to frame them.

Q. At that time they might have appealed to me.

A. They didn't to me.

Q. What I mean is this: They never at any time said to you that they would pay you \$19,000 in cash and assume this mortgage?

A. They certainly did. Mr. Roosevelt Johnson said they would pay me \$19,000 at the end of ten years, and he issued those ten-year certificates bearing six per cent interest every month.

Q. Did he state that this, however, would be paid only in investment certificates? Didn't he say that?

A. No, he told me he would pay me in hard cash. He didn't say anything about investment certificates.

Q. Did he state that so far as the company was concerned, that the only way in which the company could satisfy this demand at the present time was by giving investment certificates?



A. He said he could not pay me the money now, but he would give me these papers, or whatever you call them, and he would give me my money at the end of ten years.

Q. Had you not at that time heard of any other people having bought these investment certificates?

Mr. Aydelotte: We object to that question as incompetent, irrelevant and immaterial.

The Referee: The objection is overruled. (Question read.) A. No.

Mr. Clark: Q. Had you never heard in your life, prior to the time of receiving these investment certificates, of any other human being [53] who had received any of them?

A. I didn't know of a soul that had ever had one of those investment certificates, or those notes."

Further along in the same cross-examination (Transcript, p. 737) appellant testified:

"Q. Then when you took these certificates you understood that you were looking to the company generally, for the payment of the money, and not looking to any particular piece of real property as security for the payment of the money? Isn't that the fact?

A. When I took their notes I understood that they were going to pay me in a certain time, and I didn't think about—I thought they were good people and that they would pay me. I didn't think just about a particular piece of property, but I thought that they were all right."

The fact that appellant did not know that she had a vendor's lien—that she was ignorant of the existence of such a right in law or equity cannot militate against her. On the contrary the Court should infer that her very ignorance in the matter is a strong circumstance against a waiver.

Appellant could not expressly waive a right of whose existence she was ignorant, and the legal implication of such waiver can be based only on the clearest evidence of her acceptance of security or other means of payment.

“The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. (Citation.) And so long as the debt exists Courts will not presume that the lien has been waived, except upon clear and convincing testimony. (*Selna vs. Selna*, 125 Cal., pp. 357, 362.)

In a very recent case in the Supreme Court of the State of California, viz., *Braun vs. Kahn* (Vol. 54, California Decisions, p. 341 (Sept. 18, 1917), also reported in 167 Pacific Reporter, p. 869), an action to enforce a vendor's lien, the facts were that plaintiff sold defendant certain real property, being paid partly in cash and partly with a promissory note of defendant. Note being unpaid, plaintiff subsequently brought an action on the note without alleging the existence of his vendor's lien and took a

default judgment against defendant. Upon this judgment execution was issued and levied upon the property sold by plaintiff to defendant. No further action was taken looking to a sale on the levy. Subsequently the plaintiff brought an action, claiming a vendor's lien. Defendant defended on the ground that plaintiff had waived his vendor's lien by his failure to claim same in his previous suit. In the course of its opinion upholding the vendor's lien, the Court, by Mr. Justice Shaw, all other Justices concurring, says:

“In the case of *Selna vs. Selna*, *supra*, the question before the Court was as to whether the filing and allowance of a creditor's claim against the estate of the vendee without including the claim or statement of an existing vendor's lien, which creditor's claim became by its approval in the nature of a judgment against the estate of the decedent vendee, was not sufficient in itself to amount to a waiver of the vendor's lien. In that case the Court, in deciding in favor of the persistence of the vendor's lien, and in declaring the ruling of the Court in *Fitzell vs. Leaky* to be *dicta*, goes on to say: ‘It is stated by the authorities that if the vendor recovers a judgment at law and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money.’ citing *Walker vs. Sedgwick*, 8 Cal. 398-404, and *Overton on Liens*, 691. [5] The true doctrine as outlined by these authorities in this State, and as fully sustained by the great weight of authority in other states, would seem to be that in order to constitute a waiver of a vendor's lien there must be some act or

omission on the part of the vendor inconsistent with his assertion of the lien and evincing his intention to waive it, and that it must be such an act or omission as would render it inequitable to thereafter attempt to assert it; [6] and it has accordingly been held quite uniformly that in order that a personal judgment obtained by the vendor for the unpaid portion of the purchase price of the property may be held to operate as a waiver of the vendor's lien thereon, it must be affirmatively shown by the defendant resisting the lien that the vendee has property to which the lien of the judgment can attach or upon which the execution may be levied and which might thus serve as security for the debt. (*Zeigler vs. Valley Coal Co.*, 150 Mich. 82; *Roberts vs. Bruce*, 91 Ky. 379; *Dowdy vs. Black*, 50 Ark. 211, 6 S. W. 897; *Borrer vs. Carrier*, 34 Ind. App. 367.)”

In the case of *Finnell vs. Finnell*, 156 Cal. 589, Finnell, the father, bought a large tract of land from his son, and after making payments of cash and of personal property, etc., there remained a balance on the purchase price of \$92,000, for which Finnell, the elder, gave his son his promissory note, dated October 15, 1890, which by its terms was payable *ten years later*, or October 15, 1900. The opinion states the facts in the case with reference to the contentions of the defendant that the whole matter was a family settlement, the facts in relation to the organization of the Finnell Land Company, a corporation, and also the dealing with the Bank to which Finnell, the elder, was indebted in large sums of money, etc. The action was brought by the son



on October 14, 1904, or *fourteen years after the execution of the note*, and but one day prior to the barring of such an action by the Statute of Limitations, to enforce a vendor's lien upon the land which he had sold to his father, and which the father subsequently had transferred to the corporation whose shares went to the Bank, etc., as set out in the opinion. Every conceivable defense was made to the action, such as family settlement, transfer of the property to the corporation, a claimed innocent purchaser, laches, vendor's ignorance of his right to lien, etc., but the trial Court found in favor of the plaintiff and declared the vendor's lien good and ordered the property sold.

On appeal to the State Supreme Court from the judgment and from an order refusing a new trial, Mr. Justice Angelotti uses this language:

“Unless plaintiff waived his rights in that behalf, he acquired *at the time of this sale* to his father a vendor's lien on the property so conveyed by him, for so much of the price as remained unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien was valid against every one claiming under the buyer except a purchaser or encumbrancer in good faith and for value. (Civ. Code, secs. 3046, 3048.) Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our legislature has seen fit to look with favor upon it and to continue in force the old equity rules in regard thereto. As was said in *Fisher vs. Shropshire*,

147 U. S. 133, 143 (13 Supt. Ct. 201), the principle on which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by section 3046, security for and a means of enforcing payment of the consideration, so far as it can do so without injury to the rights of *bona fide* purchasers or encumbrancers for value.

\* \* \* \* \*

*But the lien is presumed to exist and is an incident of the transaction of sale in all cases unless the intention of the vender that it SHALL NOT EXIST be clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention.*

\* \* \* \* \*

The act manifesting an intention must be one substantially inconsistent with the continued existence of the lien and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance.

\* \* \* \* \*

The question in this connection is not what were the secret thoughts or expectations of plaintiff as to where he was to get this purchase money, but whether he HAD DONE ANY ACT OR MADE ANY STATEMENT THAT MANIFESTED HIS INTENTION TO ABANDON ANY RIGHT GIVEN HIM BY LAW to enforce his claim against the land, and to look solely to his father personally for pay-

ment, in other words, had he done or said anything that was inconsistent with the retention of a lien and amounted to a waiver thereof. As was said in *Moshier vs. Meek*, 80 Ill. 79, speaking of such a lien, this lien, in equity, is created without the express agreement of the parties, AND EVEN WHEN THEY DO NOT KNOW THAT SUCH A LIEN EXISTS OR IS CREATED BY OPERATION OF LAW.

\* \* \* \* \*

But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right.

\* \* \* \* \*

The trial Court found against appellant's claim that plaintiff had been guilty of laches in failing to assert his lien and bring an action to enforce the same prior to October 14, 1904, the date of the commencement of this action. We cannot hold that this finding is not sufficiently sustained by the evidence. The right of a vendor to enforce his lien continues, unless waived, so long as an action can be commenced for the purchase money (2 Jones on Liens, sec. 1064), and where a note for the purchase money is given, payable at a future day, an action to enforce the lien may be commenced at any time before the lapse of the period within which an action can be brought on the note.

\* \* \* \* \*

The sum and substance of this (testimony) was that plaintiff did not know that there was such a thing as a vendor's lien at the time of the conveyance to his father or until shortly before the commencement of this proceeding.

We have already seen that the mere fact that a vendor does not know that the law gives him such security cannot affect his right. But it is urged that the proposed evidence was 'very material additional evidence upon the question of the intent of Williamson Finnell in taking the ninety-two thousand dollar note from his father, to the effect that he RELIED ENTIRELY upon the financial responsibility of his father as security for it, and that the reconveyance WAS IN FACT A FAMILY SETTLEMENT AND COMPROMISE,' and that it went to show that no vendor's lien was ever created.

\* \* \* \* \*

The LAW, not any contract of the parties, gave him the lien if the transfer of the land to his father was an ordinary sale, and we do not think that the proposed evidence as to his ignorance of the law relative to a vendor's lien was such as to throw any light upon the question whether it was a sale, or upon the question whether he did or said anything which might tend to show an understanding between the parties for a waiver of any right given him by the law."

Second: The statement in the opinion of the Court below that the assertion of a vendor's lien in this case is utterly inconsistent with the purpose for which the property was conveyed; that the holders of all certificates were contributors to a common fund to be used and managed for the common benefit of all and that persons who contributed real property in consideration of the receipt of such certificates occupy no more favorable positions in equity



than those who contribute cash, is, we submit, an erroneous inference and conclusion from the evidence adduced in this case.

Besides the testimony of appellant herein, some of which has been quoted above, the testimony of Mr. Aydelotte, witness for appellant (Transcript, pp. 102 to 107) and the testimony of Mr. Roosevelt Johnson, Vice-President and Manager of The Realty Union (Transcript, pp. 125 to 133), shows conclusively that appellant was at all times insisting upon her legal rights to payment of the balance of the purchase price of the real property conveyed by her to The Realty Union.

Instead of the inference that appellant was a contributor to a common fund to be used and managed for the common benefit of all purchasers of the investment certificates of The Realty Union, the irresistible inference to be drawn from the facts in this case is that appellant was not making an investment in the certificates of The Realty Union, but was selling it a certain piece of real property for a certain price payable about one-half in money and one-half in promissory notes. She was not an investor in the company's business, as would be a person who purchased shares of stock in a corporation.

If appellant is to be charged with knowledge of the general business purposes of The Realty Union (although, we submit, there is no evidence of this),

also must all other vendors of property to The Realty Union, and all purchasers for cash of the investment certificates of The Realty Union, be similarly charged. In other words, such other vendors of real property to The Realty Union, and investors in the certificates of The Realty Union, must be charged with knowledge that vendors of real property to The Realty Union are not paid cash in full for such property and so are entitled to the vendor's lien given them by law and such other vendors and investors must necessarily make their sales and investments subject to such knowledge.

The further statement in the opinion of the Court below that the "assertion of the lien here would destroy all equality between the different investors and would be inequitable in the extreme, *especially in view of the fact that the moneys received from other investors have no doubt been used to discharge the numerous liens existing against the property at the time the conveyance was made,*" has, we submit, no force as a reason for rejecting appellant's claim of lien inasmuch as such moneys, if so used, were replaced by the property itself and the property is to that extent subject to their claims. The appellant's claim of lien attaches only for the balance of the whole purchase price of the property in question for which no money or security has been paid or given other than the two promissory notes aggregating the sum of Nineteen Thousand (19,000) Dollars.

In this connection, we quote as follows, viz.:

“The principle upon which Courts of equity have proceeded in establishing these liens in the nature of a trust is, that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money. A third person having full knowledge that the estate has been so obtained ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. It would otherwise happen that the purchaser might put another person into a position better than his own with full notice of all the facts.

If the purchaser alleges that the lien does not exist for any reason in a particular case the burden is on him to show the circumstances which repel the presumption of its existence or rebut its equity.” 4 Kent Comm. (11th Edn., 153 and cases); 2 Sugd. Vendors and Purchasers (8th Am. Edn., p. 376 and notes).

For the purpose of the argument—If appellant here is to be charged with knowledge of the general course of business of The Realty Union (being simply a vendor of real property at a fixed price), the general investors in The Realty Union certificates are *a fortiori* chargeable with such knowledge and are in the position of the third person mentioned in the above statement of the law. To give such investors the full benefit of the whole value of the property of appellant, having paid only one-half of such value, would, we submit, be “inequitable in the ex-

treme.” There are no circumstances in the case at bar which repel the presumption of the existence of appellant’s lien or rebut its equity.

The case of *Royal Con. Min. Co. vs. Royal Con. Mines*, 157 Cal. 737, upon which respondent herein will undoubtedly rely, differs essentially in its facts from the case at bar.

In the case cited the facts are that the vendor sold certain real property to one Kemp Van Ee in accordance with the terms of a written contract between them whereby Van Ee paid down a certain part of the purchase price in cash and was then to

“proceed forthwith to incorporate a company in London under the Joint Stock Companies Acts of Great Britain, for the purpose of acquiring the aforesaid properties, and said company shall have a nominal capital of 250,000 shares of one pound each, of which 25,000 shares, at the par value, shall be reserved for the purpose of providing working capital for the said properties, and the balance of shares, namely, 225,000 shares, shall be issued fully paid up and be deposited in London with the Anglo-Californian Bank, Limited, as security for the payment of the balance of the purchase consideration of \$400,000 for the said properties, and upon the allotment and deposit of said 225,000 shares, the property shall be duly and legally conveyed by the purchaser to the company to be formed as aforesaid to acquire the same, free from all incumbrances.



The agreement further provides that the balance of the purchase price, namely, three hundred and forty thousand dollars, 'shall be paid in the manner following, that is to say, an amount equal to eighty per cent of the net proceeds arising from the working of said mines shall be paid to the vendor monthly on or before thirty days after the time of each and every clean-up, and shall be credited as aforesaid on account of the purchase consideration; provided, however, that as sales are made of said 225,000 shares, or any part thereof, as herein provided, the purchaser shall pay only such proportion of said amount equal to said eighty per cent of said net proceeds as the number of shares remaining in said bank bears to the total of 225,000 shares.' The following paragraph provides that 'the purchaser, however, shall have the right from time to time to otherwise discharge so much of the purchase consideration as he may think fit by the sale of as many of the said 225,000 shares as he may think necessary or advisable, always provided that none of the said shares shall be sold for less than their par value, and that in any event, as the same may be sold, they may be withdrawn by the purchaser or released, as he shall direct, against a payment to said bank for account of said vendors of ninety per cent of the par value of said shares, to apply upon said purchase consideration.'

After the payment, however made, of the balance of the purchase price, all the shares remaining in the hands of the bank are to be delivered to the purchaser. The vendors agree in paragraph 8 that upon the payment of the sixty thousand dollars they will deposit with the Anglo-Californian Bank, Limited, in San Francisco, a good and sufficient deed convey-

ing to the purchaser, his nominee or nominees, satisfactory title to all of said properties free and clear of all encumbrances whatsoever, together with a letter of instructions authorizing and directing said bank to deliver such deed upon receiving from the Anglo-Californian Bank, Limited, in London, a cablegram to the effect that the said 225,000 shares have been deposited with the said bank in London to be dealt with in accordance with the terms of the contract. It is provided that until the payment of the balance of \$350,000 the vendors may have a representative upon the properties, but that upon the payment of the \$60,000, possession of the properties is to be turned over to the purchaser. By the terms of paragraph 11 it is agreed that if the whole purchase consideration shall not have been paid at the expiration of four years 'then the balance of shares remaining in said bank shall, at such time thereafter as may be determined by said vendors, be divided between vendors and purchaser so that the purchaser receive such proportion of said shares as the whole amount of money paid by him hereunder bears to the entire amount of said purchase consideration; and the vendors shall receive the balance of shares in satisfaction of the purchaser's covenant to purchase.' The agreement further provides that it is to be binding upon and inure in favor of the heirs, representatives, successors, and assigns of the respective parties."

In the course of its opinion the Court says (page 747 of the Report):

"The respondents point to various elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that

the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties. That scheme, briefly stated, was this: The mines, owned by plaintiff, were to be conveyed, free and clear of encumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unencumbered, to it. Ninety per cent of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to be subjected to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the consideration stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of one pound each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that a title apparently free and unencumbered should be conveyed to a corporation which should, upon the basis of such title, issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the price which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to

this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in a property which was subject to a paramount, but unrecorded, lien for \$340,000, or did they propose to offer at par, shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor was intended to be retained. *In re Brentwood Brick & Coal Co.*, L. R. 4 Ch. Div. 562, was a case in which property was conveyed to a corporation for a consideration of six thousand pounds, to be paid by the payment to the vendor of fifty per cent of all money received by the company on the sales of shares, and a like fifty per cent of all money by way of capital to be at any time borrowed by the company, until the six thousand pounds should be paid. The transaction was held to be such as to exclude the idea of the retention of a vendor's lien. Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J., said: 'To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property.' The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one-pound shares of a corporation owning no assets beyond an equity of redemption (worth, perhaps, \$60,000) in a property subject to a lien of \$340,000. Again, the covenant that the plaintiff's conveyance to Van Ee, and his



subsequent transfer to the British corporation should be free and clear of encumbrances excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in *Slide & Spur Gold Mines vs. Seymour*, 154 U. S. 509 (14 Sup. Ct. 842), it was held that a somewhat similar covenant was to be construed as referring 'to prior charges and encumbrances' and not to 'any which arise out of the conveyance itself.' But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of encumbrances the restricted meaning applied to the *Slide & Spur* case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of encumbrance.

But apart from this somewhat technical consideration, we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the *Slide & Spur* case, is such as to make the existence of a vendor's lien inconsistent with the proper execution of the plan agreed upon."

The gist of the case cited is the absolute agreement between vendor and the original purchaser that the holding company should be formed to operate the property and that the shares of such company should be dealt in to secure the payment of the

balance of the purchase price and that the vendor should deed the property to the original purchaser free and clear of all incumbrances to this end.

We submit that there is no similarity between this case and the case at bar. The sale in the case at bar was an out and out transaction between appellant and The Realty Union without reference to another company or corporation or shares of stock or security of any kind. The fact that conveyances from appellant and Wallace were made to Mr. Roosevelt Johnson and to a Mr. Caro Mills in the first instance is of no significance. It is admitted on all sides that Mr. Johnson and Mr. Mills were acting directly as agents of The Realty Union and reconveyed the property in question almost immediately to The Realty Union.

In the case of *Slide & Spur Mines vs. Seymour*, 153 U. S. 509 (14 Sup. Ct. Rep. 842), Mr. Justice Brewer, in delivering the opinion of the Court, says:

“It is not questioned in this case that a large part of the money consideration for the sale of these mines remains still unpaid; and the defendant is in the attitude of one who, admitting that the vendors have not received the money for which they sold the land, nevertheless insists upon retaining the property, discharged of any obligation for its payment. Its contention is that the plaintiffs sold to Haldeman, and that Haldeman sold to it, and that inasmuch as the terms of the original proposition of October 19, 1886, were not complied with, a new agreement was made on August 18,

with, a new agreement was made on August 18, title 'free from all charges and incumbrances,' and to rely for their security upon a portion of the stock of the grantee deposited with one of its charges and incumbrances obviously refers to prior charges and incumbrances, and does not exclude any which arise out of the conveyance itself. It means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed, and that the deed shall pass the title perfect and unincumbered, but not that the grantee shall take it free from all obligations of payment, or discharged from the lien for the purchase price which rests upon real estate until such price is paid. The language of the covenants in the deed is in harmony with this thought; for after the covenant of seisin, and of the right to sell, follows one that the premises 'are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever.' It will be noticed that this agreement was not between the grantors and a third party, who was seeking to accomplish, with profit to himself, a sale from the plaintiffs to the defendant, at the price they demanded, and who was seeking to utilize the stock of the defendant in securing money for the cash part of the consideration. There is no presumption from the delivery of the deed that the plaintiffs intended to waive their lien for the purchase money. Indeed, it is characteristic of a vendor's lien, as distinguished from a contract lien, that it arises upon

a transfer of title. It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security."

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### **Conclusion.**

Appellant submits that she is entitled to her vendor's lien.

That there is no evidence, nor can there be any proper inference from the evidence indicating a waiver of such lien.

That the mere acceptance by her of the investment certificates of The Realty Union (to her simply promissory notes) as evidence of the existence of the indebtedness, cannot imply a waiver of such lien. Indeed, it is of significance in this connection that in the negotiations between appellant and The Realty Union appellant objected to the long intervals between payments of interest on the Union's indebtedness to her and exacted monthly payments of interest instead of the company's usual semi-annual payments (Transcript pp. 51-52). She made her own bargain with The Realty Union without regard to its general course of business.



Her whole purpose was simply to sell The Realty Union a certain piece of land and to make the best bargain for payment of principal and interest she possibly could. There is not the slightest indication in any of the evidence that she wished to become a participant in the general business of The Realty Union, to share in its prosperity or to suffer from its adversity.

Respectfully submitted,

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*Attorneys for Hattie Hardesty Chapman, Appel-  
lant.*

Dated: San Francisco, Cal., February 11, 1918.

No. 3077

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

*Appellant,*

vs.

R. M. SIMS, Trustee in Bankruptcy of The  
Realty Union, a Corporation, Bankrupt.

*Appellee.*

## BRIEF FOR APPELLEE

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Filed this.....day of March, 1918.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

FILED  
MAR 2 1918

C. L. ...



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## BRIEF FOR APPELLEE

As a part of our brief, we will call the Court's attention to the opinion of Judge Rankin. (Trp. p. 242, 247) and to the opinion of the Referee (Tr. p.p. 219, 240).

But for more reasons than are stated in those opinions the appellant is not entitled to relief.

Most of the material facts in this case are to be found in the Referee's Certificate on Petition to Review, found at pages 219 to 240 of the Transcript. In this certificate the Referee has summarized most of the evidence supporting the recitals or findings contained in the Order of the Referee, found at pages 194 to 212 of the Transcript.

The property in question lies in the City of Oakland,



has a frontage of 253 feet 8 inches on Telegraph Avenue and a uniform depth of 125 feet. This property was transferred to the representatives of The Realty Union, Bankrupt, by the appellant, Hattie Hardesty Chapman, and by one William Carlton Wallace, and it is claimed that out of these transfers a vendor's lien upon the property arose in favor of Hattie Hardesty Chapman. Two deeds were made. The exact dates of the deeds will be given. The facts in regard to the condition of the title, the encumbrances thereon and these transfers were all matters of record and the Court will observe that in the Order of the Referee all of the facts in regard to these matters are set forth in chronological order.

Counsel for appellant, in referring to the record that was offered, criticize the volume of the evidence, but all of the evidence was important for the purpose of showing the nature of the business transacted by The Realty Union and the nature of the deal between The Realty Union and the appellant, which resulted in a transfer of the property. It conclusively appears from the summary of the facts set forth in the Referee's Certificate and it conclusively appears from the evidence, which we shall hereinafter quote, that the Realty Union was a corporation doing business with money, contributed in a large measure, if not entirely, by persons acquiring from such company what were called "Paid Up" or "Installment" Investment Certificates. The paid up certificates were paid for in full by the investor upon receipt of the same. Other investors were induced to acquire installment investment

certificates. The name of the concern was The Realty Union, and the name typified in a way the nature of the business transacted. The business of the company was acquiring real property, holding it for a rise in the market and selling it at a profit and this profit was to be distributed not only among its stockholders, but also among its investment certificate holders. The business was for the investors. There was a union of interests. It was promised in these certificates that the holder would receive interest at 6 per cent. per annum; if the dividends of the company exceeded six per cent per annum, the investment certificate holder would receive interest in addition which would make his total interest equal the total dividend. Real estate, moneys and other property were turned over to this company by investors upon the assurance of the company that its business was as aforesaid and that the real property was being handled for the common benefit of the certificate holders, was a security standing behind the certificates. The certificates were in the same form although of different series as indicated by the lettering and numbering thereof. It was undoubtedly the expectation of every person receiving one of these certificates that his rights in the property of the company were the same as those of other certificate holders and that there was no preference or discrimination, express or implied.

The negotiations which resulted in the transfer of the property in question to The Realty Union began in February, 1912, and were consummated about the first of

June, 1912. As appears from page 240 of the Transcript, about June 29th, 1912, the concern had received from investors about \$457,038.19. About December 31, 1912, this increased to \$550,484.69. About December 31, 1913, the amount was \$774,012.30 and about December 31, 1914, the amount was \$858,769.76. The Realty Union was adjudged bankrupt on September 11th, 1915, upon an involuntary petition. The failure was almost complete. But a trifle can be saved for the certificate holders.

There was no substantial evidence that the agreement with the appellant was that she was to be paid in anything other than investment certificates. In other words she agreed to become one of the "investors" in the company and its business, and she took and accepted the benefits of the investment certificate and received interest thereon for several years before raising the point that she had a vendor's lien. She took an investment certificate payable in ten years from date and not until she saw that the financial crash was inevitable did she endeavor to take back her property and claim a vendor's lien. She seeks to set herself up as a preferred creditor with a security upon real property which was used as the basis for the sale of certificates for thousands of dollars. We shall show her demand is most inequitable. Both the Referee and the learned District Judge in passing upon the evidence so held.

We shall briefly summarize the facts in regard to the title and the transfer of the title to the Realty Union.

On February 23, 1912, the land in question was owned in part by William Carlton Wallace and in part by Hattie Hardesty Chapman. The north 53 feet 8 inches of the Telegraph Avenue frontage was owned by Wallace, his lot having a depth of 100 feet. The balance of the tract belonged to Hattie Hardesty Chapman.

On February 23, 1912, the property in question was burdened with debt, and it was not producing a dollar of income and was about to be lost for the debts piled upon it. Wallace got part of it into the hands of plaintiff and she put on an additional mortgage. It is this property for which investment certificates were taken which *were to be payable in ten years and which counsel is asking this court to convert into \$19,000 in gold.*

The encumbrances were as follows:

1. Mortgage, dated Dec. 1, 1905, for \$6500, to Farmers' & Merchants Bank of Oakland.
2. Mortgage, dated Sept. 28, 1906, for \$1000, to E. J. Dinkelspiel.
3. Deed of Trust, dated July 1, 1909, for \$6000, in favor of Serena N. Gardner.
4. Mortgage, dated Sept. 3, 1909, for \$1000, in favor of Leander R. Webster.
5. Judgment entered Jan. 15, 1912, for \$392.95, in favor of Ransom-Crummey Co.
6. Mortgage, dated Sept. 26, 1911, for \$917.89, in favor of E. J. Dinkelspiel.

Following February 23, 1912, the following events transpired:



1. William Carlton Wallace and Hattie Hardesty Chapman, on Feb. 28, 1912, deeded the north 153 ft. 8 in. of the entire tract to Caro Mills of the Realty Union. *This included the Wallace Tract.*
2. Thereupon a release of the Leander R. Webster \$1000 mortgage and of the \$6000 Serena N. Gardner trust deed (which instruments covered the north 153 ft. 8 in.) was obtained and on April 12, 1912, Caro Mills executed a new deed of trust for \$5000 in favor of the Union Savings Bank on the same piece.
3. On May 29, 1912, Caro Mills deeded the north 153 ft. 8 in. to Roosevelt Johnson and on June 29, 1912, Johnson deeded it to the Realty Union.
4. On May 28, 1912, Hattie Hardesty Chapman deeded the south 100 feet of the tract in question to Roosevelt Johnson.
5. On June 29, 1912, Johnson deeded both tracts to Realty Union.
6. On June 10, 1912, a release of both Dinkelspiel mortgages was recorded.
7. On June 20, 1912, the mortgage to Farmers and Merchants Savings Bank was released.

Then followed other mortgages and trust deeds, as is fully recited in the order of the referee.

It fully appears that the Realty Union paid off a lot of debts for which Wallace and Miss Chapman were liable, and the property responsible and without any question being raised the property was mortgaged and re-mortgaged by the Company.

For a part of certificates in question, appellant never rendered a dollar of consideration. For a part of these certificates she never deeded a particle of property to Caro Mills or to Johnson or to the Realty Union. Yet she is before this court asking for \$19,000 after having agreed to become and be an investor in this concern exactly as every other person did who exchanged land for certificates or who paid cash therefor.

The \$10,000 certifiante issued to Hattie Hardesty Chapman on June 6, 1912, reads as follows:

"No. 10219. E. \$10000

Investment Certificate,  
issued by

THE REALTY UNION

Incorporated 1910, under the Laws of California.

Ten years after date, THE REALTY UNION promises to pay to HATTIE HARDESTY CHAPMAN of Alameda, California, TEN THOUSAND DOLLARS with interest at the rate of six per cent. per annum, payable monthly, and whenever dividends paid its Capital Stockholders exceed six per cent. per annum, the rate of interest paid hereon for the same periods shall be increased to equal the rate of said dividends.

6 per cent. GOLD 6 per cent.

This Certificate is transferable only upon endorsement and surrender. Any owner of Investment Certificates of a paid up value of not less than \$100.00 may exchange them for unimproved realty held for sale by the Corporation.

IN WITNESS WHEREOF, The Realty Union has caused this Certificate to be signed by its President or Vice-President and by its Secretary and countersigned by its Auditor at its office in the City

and County of San Francisco, State of California,  
this sixth day of June, 1912.

Jesse B. Fuller, Secretary.

Roosevelt Johnson, Vice-President.  
(Corporate Seal)

Countersigned by

G. W. Fanning, Auditor,

UNITED STATES OF AMERICA."

The \$9000 Certificate is in the same form.

This court is powerless to remove from this contract the terms which the parties built into it. To say that this instrument is a mere "promissory note", as counsel for plaintiff persist in calling it, is to trifle with both the law and the facts. It was a contract that the parties had a right to make. It was accepted and it was held for three years *and interest taken under it*.

## I.

**Plaintiff, by taking a Contract, which entitled her to land other than that which she disposed of, took security within the meaning of the law of vendor's lien.**

A vendor's lien is of course waived if the plaintiff takes security for the debt. The waiver results even though the security is legally defective, for although the security is defective, there cannot be an intent to look to the land only for the debt if there was an effort to take secur-

ity. Hence, before Section 3046 C. C. was adopted, the courts of this state had arrived at this conclusion:

“When he (the vendor) *looks* to other security, he loses his tacit lien.”

Hunt vs. Waterman, 12 Cal. 301, 305.

The opinion was concurred in by Field, J., who also concurred in the case next following which laid down the same rule, that is, that the taking of a void mortgage waived the lien.

Camden vs. Vail, 23 Cal. 634.

A vendor is deemed not to have “looked” to the security of the land when he looks to other security.

If there is “any other independent security” than the mere promise to pay the price, the lien is absolutely waived.

Baum vs. Grigsby, 21 Cal. 173, 176.

Where a note of a third person is given, the lien is gone. The vendor cannot look to such note and also to the real property. The lien is fragile and if other property is looked to it is gone.

Jones vs. Allert, 161 Cal. 234, 237.

The Code creates no lien that did not exist prior to the codes.

Claiborne vs. Castle, 98 Cal. 30, 33.

It would be indeed remarkable if a vendee buys land and gives to the vendor the worthless note of John Doe



as a thing which, by suit, he may or may not realize something out of, there is no vendor's lien, and yet, if what the vendor gets out of the vendee is a contingent contract to give him land for the amount of the note, the vendor may claim a lien. It was held by the Referee and by his Honor, Judge Rudkin, on review, that the provision for exchanging real property for the certificates was simply another means of paying a debt. But this does not dispose of the point. It amounts to treating an obligation as a right. It is exactly like calling "black", "white" to say that I have a right to pay a debt in money or in houses when my contract says the person entitled to money from me *may* demand payment in any of my land if I should ever seek to sell it. We ask the court to read these certificates carefully. It will find in them not one word that confers any right upon the Realty Union to pay the plaintiff in anything other than money. *Hattie Hardesty Chapman got the right to hand to the Realty Union at any time it might ever elect to sell any of its property the certificates in question and receive therefor the face value of her certificates in land, no matter what the remaining debts of the company might be. That this right was something, that it was a right of action, maturing like any contingent liability matures, is too plain for argument.*

Under the laws of this state there is no illegality in encumbering land with a perpetual option.

Smith vs. Bangham, 156 Cal. 359.

If a vendor takes a promissory note of another when

the bargain is made, he waives the vendor's lien in the absence of an express agreement.

Avery vs. Clark, 87 Cal. 619,

Jones vs. Allert, 161 Cal. 237.

It is not material that it is a valueless note, it is not material that the maker is but contingently liable. The point is the vendor does not look solely to the land. If the vendor should take a note of another, which note would become due, when a land company begins the sale of its land, it would be absolutely absurd to contend that the taking of such a note meant nothing in the way of security. It would be a good chose in action. There is not the slightest particle of doubt about that. Of course the contingency defeats the legal quality of negotiability but not the fact the note is a note. Promises may depend on all sorts of contingencies.

(B) Effect of Making Payable on Happening of Contingency. If the time for payment is contingent or conditional the paper will be non-negotiable; but instruments that seem to be conditional are often construed to be payable on demand or within a reasonable time, *and paper may be made payable on the happening of any event which must happen, however, remote or uncertain the time.* Thus it may be payable on a designated person's death, but not on his coming of age, or on his marriage, since these events may never happen. The completion of a railroad or building, the arrival of a public ship, or the declaration of peace, has seemed to the courts sufficiently certain to render an instrument payable on that event negotiable, and if the instrument is made payable "on the return of this certificate" it is still unconditional and negotiable. But the con-

trary has been held as to the settlement of a private estate or business, the arrival or departure of a private ship, or the time when the legislature shall have validated certain bonds, and a bill or note made payable after the election of a certain president is said to be a wager contract and void."

7 Cyc. 597, 599.

The text means the contingencies named merely destroy negotiability. Other illustrations are given in the foot-notes.

"When able", "when convenient", or equivalent expressions have been held to destroy negotiability (Humphrey v. Beckwith, 48 Mich. 151, 12 N. W. 28 ("not to be paid \* \* \* unless \* \* \* can make it convenient")); Rowlett v. Lane, 43 Tex. 274 ("at the earliest possible moment"); Salinas v. Wright, 11 Tex. 572 ("so soon as circumstances will permit me"); Ex p. Tootell, 4 Ves. Jr. 372 ("at such a period of time that my circumstances will admit") and, under an endorsement by the payee of a promise not to compel payment but to receive the amount when convenient for the maker to pay it, it has been held that the payee could never maintain an action (Barnard v. Cushing, 4 Metc. (Mass) 230, 38 Am. Dec. 362); but "when able" has been held to mean "on demand if able" (Veasey v. Reeves, 6 Ind. 406), a note for money "which I promise to pay as soon as I possibly can" has been held to be due at once (Kincaid v. Higgins, 1 Bibb (Ky.) 396), and it has been held that the meaning of a note "payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment", is not that the money shall become due only at the pleasure of the maker, without regard to lapse of time or the rights of the payee, but that the maker is to have a reasonable time, to be determined by himself, in which to pay

*the note* (Smithers v. Junker, 41 Fed. 101, 7 L.R.A. 264. So too Works v. Hershey, 35 Iowa, 340; Jones v. Eisler, 3 Kan. 134; Lewis v. Tipton, 10 Ohio St. 88, 75 Am. Dec. 498).

“When realized”—generally with reference to the fund or sale which the maker looks to—renders the instrument contingent and non-negotiable.”

7 Cyc. 597, 598.

It is absolutely immaterial in judging the promise of the Realty Union to accept the certificates for real property that that event was not to occur at a certain specified time, or that that company had some control over the date sales were to occur. Unless this court assumes that the corporation was organized in corruption to destroy and rob its stockholders, unless it assumes this in the absence of any allegation of fraud and in spite of the legal principle that fraud is never to be presumed unless pleaded and proved, it must hold that it was the honest intention of Realty Union to sell off its real property. Its business, conducted on behalf of its stockholders *and on behalf of its investors*, was to acquire real property, hold it and sell it. In no other way could it pay its investors six per cent, or any per cent., or a share of profits when they exceeded six per cent. We insist that the law absolutely requires that the court follow the presumption which prevails in the absence of evidence to the contrary,—the presumption of fair dealing. If the court follows that presumption, it is bound to say that in June, 1912, when the Realty Union promised to Hattie Hardesty Chapman that when it sold its property she would have the right to take property for certificates,



whether those certificates were mature or not, it was a promise of value, and it was a promise that meant something, *a promise that extended to properties other than the land sold*. She “looked” to other property than the land sold. Of course hind-sight is profound, and sometimes smart, and it enables counsel to say that the promises of the company and the right of claimant, by virtue of those promises, amounted to nothing. If the Realty Union had offered its land for sale, the promise would not have been valueless. It would have matured the debt and a most desirable piece of property might have been obtained. The fact that it was conditional or contingent, that the scheme did not work out, lessens its legal effect not one particle. A better piece of land might have been obtained.

“c. *Conditional Upon Future Event*. Contracts may also be conditional upon the happening of some event, the happening of which is certain, but the time of happening of which is uncertain, or upon the happening of some event or contingency which is altogether uncertain; as in the case of a contract to pay money when a certain residuary share of an estate comes to the hands of the payee, so that the amount thereof can be ascertained; a contract to purchase ‘provided titles can be approved and made’; a subscription to a particular purpose, provided a certain further sum is subscribed; a sale of goods at auction to be paid for in an approved note at six months; or a sale of goods if the seller has the goods on hand at the time. Where a debt is in fact due, and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, it is held that the law implies a promise to pay within a reasonable time.

d. *Conditional Upon Specified Fund.* A contract or promise to pay may be restricted to a particular fund, so as to make the raising or the sufficiency of the fund a condition precedent to the liability; as in the case of a promise or covenant to pay money, if the capital and funds of a company are sufficient, or out of the calls upon the shares of the company; or a promise to pay out of the rents of a certain building; and like cases.

e. *Conditional Upon Request or Demand.* A contract may be conditioned upon a request or demand of performance. The making of the request or demand is then necessary to render the contract absolute, and in an action for a breach of the contract it must be alleged and proved. An action is not sustainable upon a note payable in specific articles on demand, without proof of a special demand. On a promise to deliver goods, where no time is mentioned, a demand is necessary before beginning suit. Unless the contract so provides the demand need not be in writing.

f. *Conditional Upon Notice.* A contract may also be conditional upon notice of some matter being given; and notice must be given accordingly, in order to render the promise absolute, and must be alleged and proved in an action brought upon it.

\* \* \* \* \*

g. *Conditional Upon Act or Will of Third Persons.* A promise may be conditional upon the act or will of a third person."

9 Cyc. 615, 617.

Let us suppose that the plaintiff's land had been the only land sold to this corporation;—and of course we have the right to judge of the effect of this contract

under every condition;—let us suppose further that it had comprised several parcels and was disposed of at a figure of \$100,000 and certificates were taken therefor, let us suppose that because of bad business conditions the company concluded that it should sell its land; would any court hold that the certificates of Hattie Hardesty Chapman would not at once absorb the land? The plain truth of the matter is, the company entered into a solemn obligation with Hattie Hardesty Chapman that prevented it from selling its lands without giving her and her co-holders of certificates virtually the preferred right of purchase. The certificate was not government scrip, but it was private corporate scrip. It was scrip, nevertheless. To ignore this feature of the contract is to tear it in part, is to refuse to analyze the contract made, to consider its terms, and accord to them the meaning which appellant finally confessed she knew those terms had.

It is no answer to the argument made that this plaintiff took a contract for land to say that it related to no particular piece of land, *for the very instant the land was for sale and she selected her land, she perfected the right to enforce specific performance, a right given by contract.*

“A contract giving one of the parties the right of selection of the lot or lots to be conveyed is not incapable of specific performance.”

36 Cyc. 595.

The federal government and some of the state governments have had occasion to issue contracts called “scrip”, which may be used by the holders thereof in

acquiring public land. This scrip has been issued for services and also for land surrendered or lost. The holder, through the use of it could select and acquire other land for that which he had surrendered, or the title to which had failed. No one has ever suggested that such contracts were valueless. If the federal government,—as it formerly did,—should from time to time offer its lands for sale at public auction and it had outstanding contracts permitting the holders thereof to turn such contracts in for a certain quantity of land, it was to sell, it is entirely clear that such outstanding contracts would be of value. Hattie Hardesty Chapman, in addition to the promise to pay money at a remote date, took a contract permitting her to mature and discharge her debt by applying the amount of it towards the title to other land. The procedure that she might pursue to reach out and take other property to make secure the payment of her debt is altogether immaterial. The material thing is that there was a contingent contract for that which secured the payment of the debt or some part of it.

It is of no moment that the plaintiff failed to perfect her right by making actual selection before bankruptcy. It is not necessary in order to establish that a vendor's lien was waived to show good security or legal security. If the vendor looks to an independent method of bringing about a settlement of the debt, the law will not presume that he looked to the land for it. If the vendee gives him a contract showing he looks to an independent method of settling the debt, the law does not raise for him the equity



of a lien. If he has a contract capable of execution and which if executed would give satisfaction of the obligation, equity will not aid him by raising the lien.

Hattie Hardesty Chapman received a claim on the property of the Realty Union so substantial that not a title company in existence would have passed title for another purchaser, if she had but given notice that she intended to take the property offered for sale by turning in her certificates. And her claim would not have been meaningless.

The right created was not the right of the Realty Union to exchange land for the certificate, it was not a method of payment exercisable by the Realty Union as of right to pay the debt in land. It was nothing of the sort. The right,—a *right* conferred in the way rights are generally conferred,—was a *right* created by contract in Hattie Hardesty Chapman. The contract was accepted and acted upon by the taking of interest under the contract. If Hattie Hardesty Chapman owned a piece of real property and owed the Realty Union \$1000 and gave that company a contract that when, or if, she sold her land the Realty Union should be privileged to turn the debt in for the land, would she feel that her land and her rights were unburdened? If the contract extended to all the land she owned, would she feel that her lands and her rights therein were free from claim? Is it not plainly the theory of the law of vendors' liens that the party must not look to property beyond the property sold? Can a court hold that the intent of the parties to

a contract is something outside of and *beyond legal intent*,—intent following from the unambiguous meaning of the words used? We most respectfully urge that Hattie Hardesty Chapman, when she made the deal in question took of and from the Realty Union a certain *right*, that she took it through the terms of a written contract, that if a contract is in writing the terms thereof control. And of course the court should observe the rule that the contract is not to be judged in the light of what afterwards occurred.

“A court of equity cannot undertake to set aside the deliberate contracts or obligations of parties fairly and freely assumed because time may show that the obligation was onerous or unprofitable.”

Parsons vs. Smilie, 97 Cal. 647, 657.

“It remains only to consider whether there was any unconscionable advantage taken of the plaintiff. This question must be determined, not in the light of subsequent events, but upon the circumstances existing at the time of the negotiations and the execution of the contract.”

Colton v. Stanford, 82 Cal. 351, 403.

We are not called upon to argue the question of the right given under the certificates. After repeated effort to appear ignorant of the contents of the certificate, Hattie Hardesty Chapman herself testified:

“Q—Well, you looked at your investment certificate, and you understood that your investment certificate entitled you to call upon them for a statement of their properties, and entitled you to ex-

change, if they had any for sale, didn't you? A—  
Yes, sir."

Tr. p. 89.

Not a contract for land? Had Hattie Hardesty Chapman got the list she wanted and the land had suited her, would this court have heard of this suit? And if not, why? Because she had a contract that enabled her to get other land. That the contract was contingent and not absolute lessens not one particle its effect in preventing the transaction from being one in which the naked promise of the vendee to pay the price was taken.

## II.

**The nature of the Contract shows the lien was waived.**

Section 3046 C. C. does not mean that a vendor's lien is preserved in every case, unless security is taken. The section is absolutely no enlargement upon common law principles.

Claiborne vs. Castle, 98 Calif. 33.

The slightest analysis of the rights of the holders of the hundreds of these certificates shows that the lien was waived. It was waived because the scheme and plan was to create a common fund which extended value to all certificates with absolute equality as regards interest paid and dividends paid and as regards the liability of

the properties to absorption by certificates. Every certificate holder was referred to as, and he was in truth, an investor. Each certificate called attention to the existence of other certificates. When a person put in his money or his land, and he received his certificate he was an investor and he had something of value. The reports of the company always declared the holder an investor. He was such. *That the certificate holder could have sued for an accounting no sane person would deny.* His contract gave him a direct and personal interest in the profits of the company in addition to his right to take from the property any of its land in exchange for its realty if it endeavored to sell it.

The opinion in the case next cited, which case was decided after the Finnel case, is very significant:

“The respondents point to *various* elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that *the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties.* That scheme, briefly stated, was this: The mines owned by plaintiff, were to be conveyed, free and clear of encumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unencumbered, to it. Ninety per cent. of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to



be subject to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the consideration stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of one pound each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that title apparently free and unencumbered should be conveyed to a corporation which should, *upon the basis of such title*, issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the prices which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in a property which was subject to a paramount, but unrecorded, lien for \$340,000, or did they propose to offer at par, shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor was intended to be retained. In *re the Brentwood Brick & Coal Co.*, L. R. 4 Ch. Div. 562, was a case in which property was conveyed to a corporation for a consideration of six thousand pounds, to be paid by the payment to the vendor of fifty per cent of all money by way of capital to be at any time borrowed by the company, until the six thousand pounds should be paid. The transaction was held *to be such as to exclude the idea of the retention of*

*a vendor's lien.* Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J. said: 'To my mind it is clear that he intended to rely on that fund for payment, *and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property.*' The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one-pound shares of a corporation owning no assets beyond an equity of redemption (worth perhaps \$60,000) in a property subject to a lien of \$340,000. Again, the covenant that the plaintiff's conveyance to Van Ee, and his subsequent transfer to the British corporation should be free and clear of encumbrances excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, (14 Sup. Ct. 842), it was held that a somewhat similar covenant was to be construed as referring 'to prior charges and encumbrances' and not to 'any which arise out of the conveyance itself.' But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of encumbrances the restricted meaning applied in the *Slide & Spur* case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of encumbrance.

But apart from this somewhat technical consideration, *we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the Slide & Spur case, is such as to make the execution of a vendor's lien inconsistent with the proper execution of the plan agreed upon.*"

Royal Con. Min. Co. v. Royal Con. Mines,  
157 Cal. 737, 747, 749.

Counsel will contend that the controlling feature of the case was that the property was to go to the corporation free of lien. Judge Sloss expressly declined to put his opinion upon such ground. We ask the court to bear this in mind in considering this case.

The general scheme shown by the transaction may indicate no vendor's lien is reserved.

Brown vs. Gilman, 4 Wheat. 256, 4 L. ed. 564.

The case last mentioned disclosed a certificate issuing scheme.

*In the federal case next mentioned there was a covenant to transfer town lots which had not as yet been laid out and which would not be laid out until the vendee acted.* It was said:

"One of these quite apposite to the case before us is thus stated in Snell's Principles of Equity (2d Ed.) 109, as the "true rule":

'Although the mere giving of a bond, bill, promissory note or covenant for the purchase money, or the granting of an annuity secured by bond or cov-

enant, will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant or annuity was substituted for the consideration money, and was in fact the thing bargained for, the lien will be lost."

For a technical statement, it would seem to have been more accurate to say that in such circumstances no lien would be implied. But in substance it no doubt states the settled rule of law in England and is the prevailing law in the United States."

Welch vs. Farmers' Loan & Trust Co., 165 Fed. 561, 565.

Where land is disposed of for shares of stock and no time for delivery of the stock is fixed, the vendor's lien is waived. The law implies the stock will be delivered in a reasonable time. If the stock proves worthless, the lien is nevertheless waived.

Greenberg v. California B. R. Co., 107 Cal. 667.

In this case the court said: p. 673.

"It certainly could not have been the intention that these parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous, and its stock valuable, that they would then take it; but if the corporation became involved they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien."

Greenberg v. California B. R. Co., 107 Cal. 667.



We ask the court particularly to note *that one of the conditions in the contract which Hattie Hardesty Chapman took was a right which pertains to a share of stock.* When the dividends of the company exceeded six per cent. she was to share in the excess. If it had made 100 per cent. she would have received \$38,000 for her land.

“The conveyance of real estate to purchasers, who, with the knowledge and consent of the seller, buy for the purpose of reselling to third persons free from incumbrances is inconsistent with a purpose on his part to retain a vendor’s lien, and is an implied waiver of the lien.”

In re V. & M. Lumber Co., 182 F. 235.

In the case the court went on to note that the intention evidently was to convey to a corporation composed of the grantors *only* and therefore the rule would not apply. But here it was as plain as daylight that Hattie Hardesty Chapman and her agent, Wallace, knew exactly what they were doing. *They were turning the property into the corporation not with an obligation restricting and burdening it for a ten-year period but knowing it was to be held and sold whensoever the company saw fit and without obligation to hold in reserve, the purchase price for a ten-year period.*

We call the court’s attention to the following testimony:

“Q—Now you are quite distinct in your impression that Mr. Johnson told you that they had in mind the holding of this piece of property that they got from you, because they thought it would increase in value? A—Yes.

Q—Well, did you expect, when he told you that, that if it increased in value so that there was a chance for selling it at a good profit, that they would sell it at a good profit? A—*Why sure they would have.* That is business, isn't it?

Q—That is business in that business.”  
(Tr. p. 86.)

Also the following:

“Q—When this was read to you, Miss Chapman, did you notice that there was in this certificate a promise to pay you something in the way of dividends in the event that the dividends in this company exceeded a certain specified amount? A—Yes, I remember that.

Q—You remember that? You knew that this was a company which was buying and selling real property, didn't you? A—Yes.

Q—And that that was the way in which, if it paid dividends or profits, it was hoping to make them? You understood that, didn't you? A. Well, I didn't think that the dividends would amount to anything, particularly to me, because I thought, well, if they had to make money, why, it would simply increase my interest.

Q. That is, it would simply be added to what you would get? A. Instead of my getting six per cent., why, perhaps they might be able to pay me seven per cent.; something like that.

Q. But did you understand that if this company made money it would make it by buying and selling real estate, didn't you? A. Why yes, that is what I understood.

Q. Well now, as regards this particular piece of property which you turned over to them, you fully

understood that that piece of property would pass right into the usual amount of property which they had, and that they would deal with that just like they would deal with any other item of property, didn't you? A. *Well, I supposed they would try to sell it and I expected them to pay me for it.*

Q. You expected them to pay you for it, but at the same time, knowing the business in which this concern was engaged— A. (Int.) I didn't want to give it to them for practically nothing.

Q. At the same time, you didn't expect them to sit down and hold that piece of property until the end of ten years? A. I didn't know how they were going to get my money to pay me.

Q. But you knew that this concern was a concern, as you have stated, which bought and sold real property? A. Yes.

Q. That was clear in your mind. *And that if it made any of this extra per cent. price or dividends which they referred to, that it would make them by buying and selling real property, any such real property as they had? You understood that, didn't you? A. Why, yes."*

Tr. p. 57, bottom to p. 59, mid page.

"Any act which indicates that it was not the intention of the parties that the purchase money should continue a lien upon the land conveyed is a waiver of the lien."

Dudley v. Dickson, 14 N.J.Eq. 252.

"If, however, the grantee's own bond, note, or other promise is given, not as security for the price, but as a substitute for or in novation of the purch-

ase price, so that no debt for the price any longer exists, the lien is destroyed," etc.

Pom. Eq. Jur. Vol. 3, Sec. 1352.

William C. Wallace was the appellant's agent who made the deal and his testimony shows conclusively that it was distinctly understood that the sale was for certificates and not for cash, or a straight out promise to pay cash.

"So I offered Mr. Johnson, as nearly as I can recall, a proposition like this: that if he would purchase the property for the Union at a price to be agreed upon as being fair—and that was a matter that we could not decide in a minute—that if he would furnish money enough to pay off this indebtedness, that we, the owners of the property—and I assumed to act for Miss Chapman because she was a part owner in the property, though she was not involved in the difficulties therein—that *we would accept for the balance of the payment the certificates of the Realty Union.*"

Tr. p. 136 (bot. page).

"Q—Then as I understand, Mr. Wallace, the Realty Union agreed to pay the liens and taxes and encumbrances upon this property, and 19,700 and some odd dollars, the 700 and some dollars in money and the other \$19,000 represented by these certificates which I denominate promissory notes? Is that right? A—Well, put the word "certificates" in, yes, that was the understanding. They didn't say anything about promissory notes. That is a matter of opinion.

Q—I very adroitly put the question in that way, "which I denominate promissory notes."

Tr. p. 150, 151.



If it was a case here of a straight debt why did the plaintiff take certificates? Johnson's testimony, which was utterly uncontradicted, tells us the reason why:

"A. Yes, I showed her that in one case she owns a specific piece of property which may not increase in value, but when she takes a certificate she has an interest in all our properties, scattered over a large district, therefore there is a large chance for an increase in the value, because if one piece does not increase another piece will. Miss Chapman was familiar at that time with the fact that the Realty Union owned a great many properties, for I showed to her that our holdings covered a large distribution."

Tr. p. 120, mid page.

Entering into covenants in lieu of agreeing to pay a certain specific price waives a vendor's lien.

"Where a covenant of the vendee is substituted for the purchase money or as a mode of payment of the price of land, the land should be held discharged of the lien."

McKillip vs. McKillip, 8 Barb. 560.

We submit that the facts here fortunately permit this court to make a just decision under the evidence and not one that puts Hattie Hardesty Chapman in a preferred class as against poor school-teachers or blacksmiths who put into this concern their hard-earned coin and life savings and not a lot of property that at the time was about to go under the hammer, for attachments, street liens, taxes and past due loans.

## III.

**Equity will not enforce an inequitable demand.**

Authorities need not be cited in support of this contention. The vendor's lien is a mere equity raised by the courts.

Royal Con. Mine Co. vs. Royal Con. Mines, 157 Cal. 746.

"The general doctrine gathered from the volume of authority, would seem to be, that the lien will never be permitted to overrule or take priority of the rights or equities of third persons which have in good faith attached in ignorance of such vendor's equity, and in this respect it is utterly unlike a mortgage or any lien created by express contract or even by statute, and as the lien is from its nature secret, unknown to the world, and often productive of harm, it will not be extended beyond the requirements of the settled principles of equity and it not ordinarily encouraged by the courts."

Warville on Vendors, Vol. II, (2d ed.) Sec. 679.

Equity will not enforce a vendor's lien, where others have adopted position of danger to themselves by reason of the fact it was apparently not to be asserted.

Larscheid vs. Hashek Mfg. Co., 142 Wis. 172.  
125 N.W. 452.

The plaintiff testified:

"Q. Well, now, let me ask you this: At this time you stated that these properties of yours were unimproved. A. Yes.

Q. These that you turned over to the Realty Union? A. Yes.

Q. When this certificate was issued to you, you saw that it had a certain number upon it, didn't you? Both of these certificates were numbered?  
A. Yes.

Q. And you also understood that these investment certificates were a form of document or contract that was being issued by this Realty Union at this time, didn't you? A. I understood that they issued those, yes."

Tr. p. 61.

"Q. That is not a full answer to the question. My question is whether it was your impression that this company had outstanding, other certificates.  
A. Well, I supposed they had."

Tr. p. 63.

"Q. You saw that they had these lithographed forms? A. I had not thought particularly about that.

Q. What I mean is this: You fully understood that these were not the only two certificates which the Realty Union had issued or was going to issue?  
A. No, I didn't think they had only two."

Tr. p. 63.

Mr. Johnson, President of the concern, testified:

"It is true, is it not, Mr. Johnson, that all the realty holdings in the Realty Union after June, 1912, at the time of the dealing with Hattie Hardesty Chapman consisted of unimproved tracts of real property. A. Practically.

Q. Practically all? A. There were two pieces that were improved.

Q. And what was the value of those properties at that time? A. About a million dollars.

Q. Did you value them approximately at a million in 1912? A. Yes.

Tr. p. 179.

About the time the appellant dealt with the Realty Union, the investment certificates were \$457,038.19 and they ran up to \$858,769.76 by January 1, 1915.

Tr. pp. 172, 173.

“Mr. Johnson further testified that in June, 1912, there was outstanding in paid-up certificates of the Realty Union about \$600,000 that after June, 1912, more than \$100,000 was issued, that the only way the company would have derived anything in the way of dividends or profits would have been by selling its real estate, and they began selling about June, 1914; that the business of the Realty Union practically amounted to acquiring tracts of real property around Oakland and Berkeley, and holding the real property and selling it off at a profit (pages 10-11, Supplemental Testimony). Mr. Johnson identified an official statement of the Realty Union of June 29th, 1912, which showed that the concern had received from investors \$457,038.19 in payment of investment certificates. He identified a financial statement of December 31, 1912, which showed received of investors \$550,484.69. It was this statement he said that he referred to when he said that the amount received from investors was approximately \$600,000. He identified a financial statement dated December 31st, 1914, in which statement under the heading of liabilities is shown “received from investors, \$858,769.76” and also one of December 31st, 1913, showing \$774,012.30 received from investors. His attention was called to a statement of June 29th, 1912, under the heading of assets, “realty, \$1,039,009.65” he testified that this



realty was bought by cash, certificates and other securities. (Referee's Cert.)

Tr. pp. 240, 241.

We ask the court to read the evidence and the certificates and see if there is any way of escaping the conclusion that the plaintiff, in addition to being a participant in the profits of the Company, knew this Company was engaged in issuing to innocent purchasers these certificates which called for the land on its sale or for a share in the profits of the sale. Did she or did she not believe that others believed they were acquiring the same rights which she was ready to exercise? What kind of equity, or what kind of justice will now raise for her a secret lien? We do most earnestly insist that courts sit to uphold honesty and that it would brand a rank and dishonest claim with its approval if it raises the alleged lien. Does this court doubt that those who purchased thousands of dollars worth of certificates after the land in question was turned into the Realty Union, purchased them believing that the lands which were the only thing underlying them were not encumbered with secret liens. The doctrine of bona fide purchaser is not confined to land purchases. It rests on an estoppel.

Where one knows his land is going to be used to float a bond issue, and he is to take some of such bonds he is not in a position to urge that he has a secret lien on the land.

Welch vs. Farmers' Loan & Trust Co., 165 F. 561.

If there ever was a lien, the dishonesty of asserting it now as against the many innocent certificate holders will defeat the claims of plaintiff.

#### IV.

### **If the lien ever existed, it was waived by demanding real property for the certificates.**

It is to be borne in mind that if a vendor's lien exists it is lost and waived by any declaration or act showing that the vendor is not relying upon it.

“Section 5 of the Civil Code provides that its provisions, so far as they are substantially the same as existing statutes of the common law, must be construed as continuations thereof and not as new enactments.” (See *Churchill v. Pacific Improvement Co.*, 96 Cal. 490.)

The recent cases of *Avery v. Clark*, 87 Cal. 619, and *Gessner v. Palmateer*, 89 Cal. 89, fully discuss this subject, and in effect hold that the code provisions do not change the character of the lien. While in those cases the title still remained in the lienholder, yet the matters discussed were fairly involved, and we again assent to the law as there declared. It is settled beyond dispute that the acts and conduct of a vendor which indicate a waiver of the lien may be shown by parol. The California cases all point directly to this conclusion, and the doctrine is clearly announced in *Moshier v. Meek*, 80 Ill. 79; *Jarman v. Farley*, 7 Lea, 141; *Jones on Liens*, sec. 1073.

*Claiborne vs. Castle*, 98 Cal. 33, 34.

In the Illinois case cited by our Supreme Court, the parent had taken notes for the land sold, but it was shown he had made declarations indicating he did not intend to enforce a vendor's lien. The court said:

‘But any act of the vendor which manifests an intention not to rely on such lien, prevents it from attaching or destroys it after it has attached.’

Moshier vs. Meek, 80 Ill. 79.

It is wholly unnecessary to show there was any consideration for the waiver and it may be made out by parol proof.

Claiborne vs. Castle, 98 Cal. 30, 34.

The oral testimony of the plaintiff was that she went to the Realty Union and asked for land. If she ever had a vendor's lien she thus expressly indicated she did not rely upon it. We ask the court to please note the following testimony:

“Q. But up to that time had you in mind the idea of turning in these certificates and obtaining from the Realty Union some of its unimproved property?

A. If I could have gotten good unimproved property I would have taken it. But he told me not to, so I said “all right”.

Q. What facts brought to your mind the advisability of turning in these certificates for unimproved property? A. Well, if I could not get my interest, why then I suppose I commenced to worry about it.

Q. But at that time it would have been of no importance to you where the unimproved property was located, so long as it was a desirable piece? Is

not that true? A. Well, I will tell you. I wanted to get this property back that I had sold them. That was what I was trying to do.

Q. Yes. A. And I don't know. He said he was going to give me a mortgage on it.

Q. Was that the occasion that Mr. Aydelotte mentioned in his question to you when the mortgage was mentioned? A. I had so many questions asked me, I don't know.

Q. You answered me a little while ago, that if they had some unimproved real property that was desirable, you were of the mind to turn in your certificates for this property. Didn't you make such an answer? A. Well, yes, if I could have found good property.

Q. If you could have found good property? A. But I wanted to get this property back that I had sold them, because I thought they could not have any better than that.

Q. But if they did have some that you thought was not quite so choice as that, and that was not available, you would have been perfectly willing to accept it? Isn't that right? A. If it was good property, yes."

Tr. p. 87, 88.

## V.

**A Vendor's Lien is not assignable, and therefore the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the Certificates issued for the North 53 feet**



**8 inches was wholly ineffectual, and caused a waiver of the lien.**

It takes a writing to transfer title to real property. There was no writing. The only showing is an attempt to transfer a right to purchase money.

While it is the law in some jurisdictions that a vendor's lien can be assigned, that is not the better rule. The Supreme Court of the State of California has held in several cases that the lien is purely personal and does not attach in behalf of other persons, where there has been an attempt to transfer to such other persons the benefit of the lien. The opinion in the next case clearly establishing this to be the law of this State was written by Chief Justice Field.

Baum vs. Grigsby, 21 Cal. 173.

“It is in the nature of a personal privilege, unassignable, which the vendor can assert, only in a suit brought for the purpose of having it decreed and enforced.”

Fitzell vs. Leaky, 72 Cal. 477, 484.

Longmaid vs. Coulter, 123 Cal. 208, 212.

The lien does not pass by a transfer of the claim to the purchase money.

Gessner vs. Palmateer, 89 Cal. 89, 92.

The right is not subject to execution and it is not the subject of a private transfer.

Ross vs. Heintzen, 36 Cal. 313, 321.

It is only the express lien resulting from a retention of title by the vendor that is assignable in this State.

Avery vs. Clark, 87 Cal. 619.

The general rule forbids the transfer of the right to a lien for the purchase money.

“Assignment of Lien. The authorities are divided on the question of the assignability of the vendor’s implied lien for the purchase money of the land sold and conveyed. In England and in some of the States of the Union, it is held that the lien is assignable and passes with a transfer of the debt on the principle that the lien is an incident of the debt”, etc.

29 Am. & Eng. Encyc. L. (2d ed), 750.

Sections 3046 and 3047 of the Civil Code, taken together, lay down the true principle. The rule cannot be evaded by attempting to make the purchase price payable to a third person. This was expressly decided in the case next mentioned in which the court restricted the right of the lien to the party disposing of the property, and denied the lien to one to whom the price was made payable.

“\* \* \* \* Section 4830, Rev. Codes, says: One who sells real property has a special or vendor’s lien thereon, independent of possession, for so much of the price as remains unpaid or unsecured otherwise than by the personal obligation of the buyer.” It is apparent from the language of the statute that it restricts the right to the one who sells. Therefore, we are not called upon to express any opinion whether it is a sound doctrine of law that one to whom the vendee has agreed to pay a portion of the price can enforce the lien. See Tyson

vs. Railway Co., 15 F. 763; Thompson vs. Thompson, 3 Lea. 126; Zwingle vs. Wilkinson, 94 Tenn. 246, 28 S.W. 1096; Frances vs. Wells, 2 Colo. 660; Jones Mtg., Sec. 214; 28 Am. & Eng. Enc. Law, 169, note 3. He cannot under our statute, because the plain language is that the lien is given to the one who sells, *and the implication is that no one else is entitled to such a lien.* Our statute was intended to clear up the law on the subject of vendors' liens in this State and cover the whole ground."

Bray vs. Booker, 72 N.W. 933.

Equity will not correct a gift deed.

Fickes vs. Baker, 26 Cal. App. Dec. 641.

Equity will not aid the appellant's claim here. It is conceded and the records show that on February 28, 1912, William Carlton Wallace owned the north 53 feet 8 inches of the land in question, and that this tract so owned by him had a depth of 100 feet. The title to the balance of the property stood in Hattie Hardesty Chapman. On February 28, 1912, William Carlton Wallace and Hattie Hardesty Chapman conveyed to Caro Mills, by grant, bargain and sale deed, which deed was duly recorded in Book 2059 of Deeds, page 44, Alameda County records, the north 153 ft. 8 in. of the tract in question, and the conveyance included the portion of the land owned by Wallace.

Caro Mills was acting for the Realty Union. We have already pointed out that it was obvious that he was to deal with the property as if it was unincumbered property. We have already noted that he caused the

property to be encumbered. On May 29, 1912, Caro Mills deeded the property which he had received from Wallace and Hattie Hardesty Chapman to Roosevelt Johnson. This deed was recorded in Book 2067 of Deeds, at page 266, Records of Alameda County.

On May 28, 1912, Hattie Hardesty Chapman deeded the south 100 feet of the tract in question to Roosevelt Johnson. This deed was recorded in Book 2070 of Deeds, page 258, records of Alameda County.

On June 29, 1912, Roosevelt Johnson and wife deeded the entire tract to the Realty Union. This deed is recorded in Book 2092 of Deeds, page 45, records of Alameda County.

It appears, therefore, that Wallace tried to assign to Hattie Hardesty Chapman his share of the contracts represented by the investment certificates. Under these certificates it is perfectly obvious that the holder looks to other property than the land disposed of as a means of payment, but if the certificates are merely promises to pay the purchase price and if the scheme did not involve an understanding that the company was to have the privilege to deal with the land as if it were free and clear, and that all investors were to have the same equal rights, then it is apparent that no lien attached to the north 53 feet 8 inches, with the depth of 100 feet.

To summarize the foregoing points, we submit that it clearly appears:



1. That the certificates are contracts in writing, that it is an inseparable part of them that the plaintiff took a contingent contract for other land as a means of satisfying the debt and that she speculated for three years upon the right and now seeks to claim it never existed and asks a court of equity to raise a lien for her on the theory that she took no kind of security contract at all; that it is entirely immaterial that her security contract was hedged about with restrictions, that a collateral promise is a collateral promise although it is contingent, uncertain and conditional, that if more than the naked promise to pay is taken, no lien exists, and that a court of equity will not raise the lien if the security contract is worthless in fact or worthless in law;

2. That the code sections are not intended to allow a lien although security is not taken, if the contract is a part of an entire transaction, the full execution of which is inconsistent with the lien; that a common sense or fair interpretation of the certificates was that no one of the holders was to have both a lien on the land he traded for the certificates and in addition a right to lay claim to any other of the land whensoever it might be sold or to the profits of sale, but that the certificate holders were investors with equal rights.

3. That to adopt any other construction of the transaction would also instantly lead to harm and injury to the many other certificate holders whom Hattie Hardesty Chapman knew were buying the certificates on the

faith of the right to have them exchanged for any of the company's land and on the faith of the right to have the company's lands sold so they might share in the profits thereof; that it cannot be denied that the rights of third parties who paid in their money are involved, and that to raise a lien which was kept secret until the financial crash occurred and after enjoying the rights of a certificate holder would be most inequitable.

4. The lien was waived if it ever existed when the attempt was made to get the land called for in satisfaction of the debt; that this is true although plaintiff later changed her opinion upon the advice of her attorney.

5. Lastly, the lien could not have prevailed as against the north 53 feet and 8 inches with a depth of 100 feet. But this point while fatal need not be considered because there was no lien at all.

Respectfully submitted,

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No. 3077

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

*Appellant,*

vs.

R. M. SIMS, Trustee in Bankruptcy of The  
Realty Union, a Corporation, Bankrupt,

*Appellee.*

## SUPPLEMENTAL BRIEF FOR APPELLANT

W. F. SULLIVAN,  
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FILED  
MAR 27 1918

Filed this.....day of March, 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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## SUPPLEMENTAL BRIEF FOR APPELLANT

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Inasmuch as counsel for appellee in this case, in their brief in reply to the opening brief of appellant, have confined themselves almost wholly to a discussion of points which were decided against them by both the Referee in Bankruptcy and the learned Judge of the District Court, but which, in themselves, were not sufficient to turn the decision on the whole case, in the opinion of the learned Judge of the Court below, against them, we have asked and have been granted leave of this Court to file this brief in answer to such brief of the appellee.

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The facts of the case are, we think, sufficiently set forth in the briefs heretofore filed.

Counsel for appellee, in their brief, make the following points, viz.:

1. Plaintiff, by taking a contract, which entitled her to land other than that which she disposed of, took security within the meaning of the law of Vendor's Lien.

2. The nature of the contract shows the lien was waived.

3. Equity will not enforce an inequitable demand.

4. If the lien ever existed it was waived by demanding real property for the certificates.

5. A Vendor's lien is not assignable and, therefore, the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the certificates issued for the North fifty-three feet, eight inches, was wholly ineffectual and caused a waiver of the lien.

These points we propose to answer in their order, taking the first two points together.

These two points are based wholly on the provision in the "Investment Certificates" (so-called) reciting that "any owner of investment certificates of a paid up value of not less than One hundred dollars may exchange them for unimproved realty held for sale by the corporation."

Both the Referee in Bankruptcy and the learned Judge of the District Court held that this provision, even if of any validity at all, considering its vague-

ness and uncertainty, merely provides another means of payment by The Realty Union and was not any additional security such as is contemplated by law and equity as sufficient to defeat a vendor's lien.

This is obvious from the wording of the provision itself. This matter was wholly in the hands of The Realty Union. If it chose to put up any of its property for sale at a price fixed by itself, appellant, if she desired, could take such property in lieu of the cash payment secured by the promissory notes stated in the certificates. This did not constitute a distinct and independent security for the payment of the promissory note such as the law contemplates, but was merely a means by which The Realty Union, if requested, if it saw fit to do so, could pay its debts.

In all the cases cited by counsel for appellee in support of their contention in this regard, viz.:

*Hunt vs. Waterman*, 12 Cal. 301;

*Camden vs. Vail*, 23 Cal. 634;

*Baum vs. Grigsby*, 21 Cal. 173;

*Jones vs. Allert*, 161 Cal. 234;

*Claiborne vs. Castle*, 98 Cal. 30;

*Avery vs. Clark*, 87 Cal. 619,

the security, which was held to avoid a vendor's lien, was a distinct independent security, either a



mortgage on the property sold, or a mortgage on other property, or a promissory note of a third person, or the endorsement of a third person on the promissory note of the vendee; and it is such a security only that will avoid a vendor's lien.

In support of our contention that a distinct and independent security is meant, we submit, in addition to the case of *Brisco vs. Minah Con. Min. Co.*, 82 Fed. 952, cited in the opinion of the District Court, in this behalf, the following:

“On the other hand the lien will be considered as waived whenever any distinct and independent security is taken whether by mortgage on other land, or pledge of goods or responsibility of a third person; and also when security is taken upon the land, either for the whole or a part of the unpaid purchase money unless there is an express agreement that the lien shall be retained. The taking of the vendor's obligation does not affect the lien, but the taking of a mortgage on other property, or a bond or note of the vendee with security or a negotiable note drawn by the vendee and endorsed by a third person, or drawn by a third person and endorsed by the vendee, or a draft on a third person and accepted by the drawee, will repel the lien presumptively.”

*Mackreth vs. Symmons*, 1st White and Tudor L. C. in Eq. 447, (Hare and Wallace Notes).

“If other security (so-called) is not distinct and independent, but is simply contractually additional, the lien is not only not discharged, but is strengthened.”

Note to *Royal Con. Min. Co. vs. Royal Con. Mines*, 137 Am. St. Rep. 165;

See also *Fischer vs. Shropshire*, 147 U. S. 133, 13 S. C. R. 201.

The case of *Greenberg vs. Cal. B. R. Co.*, 107 Cal. 667 (cited by appellee) is not in point. The facts of that case show that the land was sold to a corporation not for money but for a definite number of shares of stock of the corporation and that the corporation was at all times ready and willing to deliver the stock. Of course no vendor's lien could arise.

Also the case of *McKillip vs. McKillip*, 8 Barb. 560, (cited by appellee) is not in point. That was not a case of a sale of land for a money consideration. The consideration was an agreement to support and maintain the vendor. In commenting on this case the New York Court of Appeals in *Zeiser vs. Cohn*, 207 N. Y. 407, 101 N. E. 184, said:

“There are certain cases in this State which on a superficial examination would seem to indicate that no lien (vendor's) will be sustained in favor of third persons; but a careful reading of the opinion will disclose that the real reason underlying the decisions is that the agreements under which liens were claimed were not acknowledgments for the payment of money to third persons, but agreements for support and maintenance. *McKillip vs. McKillip*, 8 Barb. 552; *Camp vs. Gifford*, 67 Barb. 434.

Agreements of that character have always occupied a peculiar place in the law of contracts to which the principle of specific performance

is more applicable than enforcement by lien. This distinction may explain the apparent contradictory statements by Judge Story in Story's Equity Jurisprudence, Sections 1227 to 1233.

See Pom. Eq. Jur., Sec. 1251 *et seq.*

**Appellee's point three—Equity will not enforce an inequitable demand.**

Appellant at all times looked to The Realty Union for cash as called for in the promissory notes given by The Realty Union. She had no intention of investing in The Realty Union's certificates as such. The testimony of Mr. Roosevelt Johnson, Manager of The Realty Union, shows this clearly. Quoting from his testimony (Tr. p. 124):

Q. (By his counsel, Mr. Brandt) Did Miss Chapman ask you any questions with reference to the certificates at that time, do you recollect?

A. Only to know how short a term to get.

Q. And what she wanted to know was the shortest term she could get? Do you recollect what you told her?

A. Yes. I told her ten years.

The testimony of appellant, quoted in our opening brief, (Tr. pp. 66 to 68) is also clearly expressive of this. Also quoting from the testimony of Mr. Wallace (Tr. p. 143):

Q. (By Mr. Aydelotte on cross-examination) Mr. Wallace, I will ask whether or not

you thought at the time Miss Chapman was given these certificates, so-called, for \$19,000.00, that the money would be paid when they fell due?

A. Unquestionably.

Q. You so thought?

A. Absolutely.

Q. And you so advised Miss Chapman?

A. I so advised Miss Chapman. I so believed, surely.

Of course, there can be no assertion of inequity in appellant claiming the enforcement of her vendor's lien as against those investors in The Realty Union certificates who made their investments prior to the sale by appellant of the land in question to The Realty Union. Such investors certainly could not have looked to this land as any security backing up their certificates. The only testimony as to the amount owing to such prior investors is given by Mr. Johnson (Tr. pp. 167 to 175), and he can merely approximate the amount. About \$500,000 or \$600,000 before June, 1912 (the date of the conveyance of this land by appellant to The Realty Union), and from \$150,000 to \$200,000 after that date.

We submit, however, that those investors in The Realty Union's certificates who made their investments after the sale by appellant to The Realty Union, cannot be heard to complain of appellant's



claim, nor can they have any rights superior or equal to appellant's rights to a vendor's lien for the reason, as stated in our opening brief, that they are chargeable with knowledge of The Realty Union's methods of doing business, and for the further reason that none of these investors in The Realty Union certificates had any lien or claim upon this particular land known to law or equity. The Realty Union held this land at all times after its conveyance in its own name. It did not convey it to any innocent purchaser, nor did it charge it directly with any of its debts to any innocent creditor except to the extent of a small mortgage to the Hibernia Savings and Loan Society whose priority to the extent of that mortgage we don't dispute.

“The lien of the vendor exists against the vendee and against volunteers and purchasers under him with notice or having an equitable title only. But it does not exist against purchasers under a conveyance of the legal estate for a valuable consideration without notice if they have paid the purchase money. The lien will also prevail against assignees claiming by a general assignment under bankruptcy laws; and against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors, for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess. So it will prevail against a judgment creditor of the vendee before an actual conveyance of the estate has been made to him; and as it should seem against such a judgment creditor after the conveyance for each party, as a creditor, would

have a lien on the estate sold with an equal equity, and in that case the maxim applies, *Qui prior est in tempore, potior est in jure.*" 2 Story Eq. Jur. (13th Edn.), Sec. 1228 and cases.

These subsequent investors were not given any definite lien on the land in question and are, of course, later in time than appellant and any rights they may have to subject the land conveyed by appellant to their claims are of a vague general nature and cannot supersede appellant's definite and special vendor's lien.

Further, no evidence at all was adduced in this case to show how much or little of this \$150,000 or \$200,000 invested in certificates after June, 1912, was so invested before appellant filed her action and recorded notice of *lis pendens* March 11, 1915, and how much or how little thereof after that date.

The Realty Union was not adjudicated a bankrupt until Sept. 11, 1915, and, although there is no evidence on the subject, we must presume that it was engaged in business up to that date.

Such latter investors were, of course, legally charged with notice of appellant's claim of lien, and certainly cannot assert that they made any investment with the Realty Union on any supposition that the Realty Union enjoyed complete and unincumbered ownership of appellant's land.

See *Fisher vs. Shropshire et al.*;

147 U. S. 133;

13 S. C. R. 201.

The burden of proof resting upon appellee to establish a waiver of lien by appellant cannot be discharged by vague and uncertain guesswork.

We submit, therefore, that, while no evidence concerning the number of investors in Realty Union certificates, as such, or concerning the amount of money invested by them (such investors being chargeable with notice of the Realty Union's method of doing business) is material in this case, or can have any weight to defeat appellant's lien, yet, if such evidence is material and does have any such weight, it must be specific and positive, especially in view of the fact that it was wholly in the power of the appellee here, and no one else, to furnish such evidence.

None of the investors can ask or expect anything more than to be subrogated to such rights only as the Realty Union itself had.

In the case of *Welch vs. Farmers L. and T. Co.*, 165 Fed. 561, (cited by appellee) the Court say at p. 565:

“The general rule is well settled that ordinarily the vendor of real estate or of an interest therein is entitled to a lien upon the estate sold for so much of the purchase price as remains

unpaid at the time of the conveyance; and it is admitted that this general rule is recognized as prevailing in Ohio, nor is it doubted that it is a principle of equity recognized by the Courts of the United States in all jurisdictions wherein it is not otherwise ordained by the local law. But the rule has its limitations. Being a creature of equity, and not of positive law, it must yield to a superior equity. So it cannot prevail against a purchaser from the vendee, for value, without notice of the existence of such a lien; for it must be admitted that one who has not taken the precaution to protect his right by some visible muniment of it, and allowed another to wear the appearance of ownership and of the power of disposition, stands upon far lower ground in the estimate of equity than one who, in good faith and relying upon the appearances which the original vendor has permitted his vendee to assume, has become a purchaser and has paid the consideration of his purchase. Hence the exception to the rule is that while the lien may be asserted against the vendee and all others standing only on his right, it cannot prevail against those who have also acquired an equity which puts them on higher ground than that of the first vendee. A subsequent purchaser, although for value, yet having notice of the facts which would entitle the first vendor to a lien, an heir, an assignee in bankruptcy, or any other who has parted with nothing, is not clothed with an equity, but has only the right of the vendee, and cannot deny the lien."

In the case of *Trust Co. vs. Steel Co.*, 79 N. J. E. 501, 82 Atl. 146, the Court say:

"The doctrines concerning vendor's lien are firmly established in our jurisprudence. They



give to the grantor or vendor who has parted with the title to his property an equitable lien on the property conveyed, to secure the payment of the purchase money. It is not a right which necessarily arises out of contract; it is rather an equity raised out of the circumstances on the ground of a constructive trust, to protect the vendor to such an extent as may be necessary; and it is difficult to see how, as between the parties, the force or effect of the lien could be enhanced by a mere agreement that a vendor's lien should be reserved, (Cited cases).

“The lien, however, may be lost by a *distinct* waiver of it or by a transfer of the title by a grantee *to a purchaser for value and without notice*. (Italics ours.)

“The grantee or mortgagee of the vendee who has notice, or is in such circumstances as that he is put upon inquiry, would take title to, or a lien upon, the premises subject to the lien of the vendor. These principles are very clear and plain. (Citing cases.)

See also in this connection *Van Doren vs. Todd*, 3 N. J. Eq. 397.

Appellee's point four—

**If the lien ever existed it was waived by demanding real property for the certificates.**

The evidence shows that no definite demand was ever made by appellant for land in lieu of the money due on The Realty Union's promissory notes. The testimony of appellant in this regard is as follows (Tr. pp. 100, 101):

Q. (Mr. Aydelotte) Is it not a fact, Miss Chapman, that at the time you had this talk with Mr. Johnson that Mr. Johnson told you there were some incumbrances on this property?

A. Yes.

Q. Did you expect Mr. Johnson to give you \$40,000 worth of property for \$19,000?

A. No, I did not.

Q. Isn't it a fact that you asked Mr. Johnson about getting this property back, having in mind the possibility of an amicable settlement of this whole business?

A. Yes.

Q. Isn't it a fact that your answer to the former question with relation to fixing the price upon the property was with relation to your \$19,000, together with whatever mortgage there might be upon the property, and then making an adjustment of the whole thing?

A. Yes.

#### Recross-examination.

Q. (Mr. Clark) In other words, if the property had gone up so that it was five times as valuable as it was before, you expected that the \$19,000 and the

amount of the mortgages would be deducted from the value of the property, didn't you?

A. I expected only my \$19,000 because I sold to them for a certain amount and I didn't expect any more from them.

Q. You answered your counsel that you didn't expect \$40,000 for \$19,000?

A. Yes.

The REFEREE.—I think, counsel, that you will not accomplish any more by pursuing this line of examination.

Mr. CLARK.—Let me ask this question, finally:

Q. If the property had gone up so that it had become worth \$100,000, you would not have expected the return of that property to you, for the certificates, would you?

A. I would have expected \$19,000 out of it.

Q. If it had been turned back you would have expected \$19,000 worth of it?

A. I would have expected \$19,000 and they would be entitled to the rest.

Q. Then you would have expected that The Realty Union, in making its adjustment with you, would fix some price upon the property?

A. I don't see what that has to do with it. All I wanted was to get my money.

Mr. AYDELOTTE.—Q. Miss Chapman, is it a fact that these conversations with Mr. Johnson were before or after you consulted your attorney with reference to a possible compromise settlement of this whole matter?

A. They were after I consulted my attorney.

Testimony of W. M. Aydelotte. (Tr. pp. 102 to 107)

The WITNESS.—I will state that as the attorney for Miss Chapman I made at least a half dozen trips to the office of the Realty Union and had conversations with Mr. Johnson relative to a compromise settlement of this whole affair, so as to avoid any litigation or entanglement. Mr. Johnson himself proposed to me, or made the proposition that we accept a note and mortgage due in three years, on this identical property. He claimed the property was worth more—was worth some fifty or sixty thousand dollars. I said, "Will you let me have some lists of those various properties which you have for sale?" And I says, "I will look over those lists and if anything appears to be right, and we can in that way effect an amicable adjustment of this matter which is satisfactory to Miss Chapman, we will see what can be done"; that I would much rather have the whole thing adjusted that way than



to have it strung out in a lawsuit. The interest was past due, and I demanded the interest but it was not forthcoming. Mr. Johnson told me the condition of the affairs of the corporation, and told me very frankly that they were in a bad way. And we had several meetings. One meeting we had in my office when Mr. Grace was present, at which the proposition of the mortgage [79] was discussed, and he told me the mortgage was on these two pieces of property, not on the one piece described in the complaint. And then coming to those conversations, and the counter propositions for a compromise settlement, on the 10th day of May or the 11th day of May, and a year ago last May I filed my suit on behalf of Miss Chapman to declare a vendor's lien on this property. All of the requests for lists of property were made at my suggestion, and with a view to a compromise of this situation. Any questions, Mr. Clark?

Mr. CLARK.—Q. Have you any memorandum of when Miss Chapman first came to you?

A. Why, I think, Mr. Clark, it was along about the first of March; somewhere in there. It seems that it was either shortly before or after the first of March. I see by the date of this letter of March 15th with reference to the statement that the payments would be withheld. It is either before or after that date.

Q. When you asked Mr. Johnson for a list of this property what made you think you were entitled to ask for a list?

A. I recognized and thought at the time that there would be no reason for asking for lists by virtue of any right; that that particular clause in the certificate didn't amount to anything, because it was not a right which we could exercise. It was a right which the corporation could exercise at its own pleasure and profit, but it was of no value to the promissory note holders.

Q. Did you tell your client that before you went over and demanded a list?

A. I don't know whether I did or not. I know that I had never explained the situation fully to my client.

Q. Had you read that particular clause in the investment certificate before you went over and demanded a list?

A. I certainly had.

Q. How many times?

A. Maybe two or three times.

Q. Was it because of that provision in the investment certificate [80] that you did go over and demand a list?

A. No, not any more than if you had owed me a thousand dollars and could not pay me, I might have gone to you for some of your property to meet the indebtedness.

Q. Did you ever make the suggestion to Mr. Johnson that the document on its face said that you had a right to exchange it for real property of this company that might be held for sale?

A. Yes, I made such a suggestion to Mr. Johnson, with this coupled to it, that the right didn't amount to a hill of beans, because the company had it in its power at all times to fix the price of the property.

Q. When you asked for a list did you tell the company that you would like to have a list of property, and to have them specify the prices that might be put upon it, or the prices that it might be held at?

A. Yes, and I told him to make the prices the best he could, because of the accrued interest that was due to Miss Chapman, and I wanted to favor her all I could.

Q. Well, at the time of these several conversations did you or your client, Miss Chapman, demand any lists?

A. I never demanded any lists.

Q. When you asked for a list you asked for prices?

A. I expected that they would give me prices.

Q. Did you as an attorney consider at that time the compromising of this case, or of this lady's claim, without making a demand of that sort? You had a list of these properties held for sale. Would you have called it compromising the case if you had traded off \$19,000 in certificates for property held at \$19,000? A. Yes.

Q. In what way would such a deal have departed, in your judgment, from the language of the investment certificate?

A. I will tell you why. Because Miss Chapman had the right absolutely to rely upon [81] the promise to pay the \$19,000 in money. She was not obligated to take one single piece of property; and the surrender of this promissory note, or of this claim, against the corporation for \$19,000 in property, and the taking of any property for it, or the taking of anything except money, would be a compromise of the case.

Q. Even though it had been exercised in accordance with the terms of the investment certificate?

A. Yes, sir; because that was merely a method suggested to discharge the obligation. And that method exists independent of any contract.



Q. Would you say that it existed independent of any contract if at any time the Realty Union had held for sale, in accordance with the terms of its contract, lists of property? A. Yes, sir.

Q. As an attorney at law were you not familiar with the fact that specific performance of a contract can be enforced even though the right to enforce specific performance depends upon the selection of a particular piece of property by a person claiming to have a right to have a specific performance?

A. That may be, but still, when the price of the property is left to arbitrary discretion of the owner, the one who holds it, it looks to me a bait to get somebody to buy these promissory notes without any value whatever.

Q. Don't you know that the rule is that specific performance of a contract must receive a fair construction, and that no Court would ever sanction the fixing of an arbitrary price, as you call it, at an exorbitant figure, in the event that you had gone to court on a suit for specific performance?

A. That is true, to a certain extent. But the Court will also assume that an arbitrary price will be fixed.

Q. When you went in there you say you went in by the authorization of your client. Didn't you find that you were making a demand that you were entitled to make under the strict terms of the invest-

ment [82] certificate, when you were asking for a list of property?

A. I say I told Mr. Johnson that that particular provision in there didn't amount to a hill of beans, in my opinion, and that is my opinion still.

This testimony shows clearly that it was not until after the failure of the Realty Union to meet its interest obligations on the notes given appellant that an attempt was made in the nature of a compromise to get the best settlement possible out of the Realty Union without resorting to litigation.

The cases cited by counsel for appellant in their brief in support of this, point four, namely, *Moshier vs. Meek*, 80 Ill. 79, *Claiborne vs. Castle*, 98 Cal. 30, and *Gessner vs. Palmateer*, 89 Cal. 89, are cases in which there was a definite and positive waiver of lien by the vendor before any breach by the vendee.

Even if it were the fact that appellant made a demand for land in payment of her money claim (and the evidence does not warrant such conclusion) nothing came of it and she made no attempt to enforce any such demand.

The law is very clear that this cannot amount to a waiver. A vendor's seeking a compromise can be no implication in itself of a waiver of his vendor's lien.

The case of *Braun vs. Kahn*, Vol. 54, Cal. Dec. 341, cited in our opening brief, and the most recent case on this subject decided in this state, shows that a vendor does not waive his lien even by pursuing his claim to judgment in an action on the debt itself.

“The vendor’s lien not being in writing or created by contract, and being only implied in equity, requires no writing to effect a release; and as it exists only by inference, anything that indicates that it is not relief on or is waived may be shown to rebut such inference. But, while this is the law, it is equally true that so long as the debt exists Courts will not presume that it has been surrendered without satisfaction, unless upon clear and convincing testimony. The burden of proof of a waiver rests upon the party alleging it; and as such waiver is largely a matter of intention, if it be doubtful from all the facts and circumstances the lien will be presumed to be still in force. Nor is it necessary for the vendor, in an action to enforce his lien, to allege that he has not waived the same; or, if the action is against a third party, that such defendant took with notice, for waiver or want of notice must be set up in the pleadings of the defendant and proved as a defense.

“Sec. 699. What amounts to waiver or abandonment. It is a settled doctrine that any act or declaration of the vendor evincing an intention to release his equitable lien, or which shows that he does not rely upon it, is sufficient to constitute a waiver of the same, and, as a rule, a Court of equity cannot revive a lien which has thus been waived. Where there has been an express agreement of waiver this result

will follow as a matter of course, while the authorities are quite united in declaring that the taking of other and independent security operates as a waiver and extinguishment. The lien is not waived, in the absence of an express agreement to that effect, by the fact that the vendor takes the note or other personal security of the vendee for the money, for such personal security is considered only as intended to meet and overcome the acknowledgment of the receipt of the purchase money in the deed, and, in effect, is not to be taken as payment, but simply as an evidence of the amount due and the time and mode of payment; but the acceptance of a mortgage on the land conveyed or of other property will ordinarily be deemed a waiver, while the same effect results from a deposit of stock or a pledge of goods. Accepting the responsibility of a third person has ever been held to work a waiver, as where the vendor takes a bill of exchange drawn by the vendee upon a third person and by him accepted; or a note of a third person indorsed by the vendee; or the vendee's own note with surety or indorser; or where, at the time of the sale, the vendor takes from the vendee a bond, with the responsibility of a third person as security for the purchase money. From every circumstance of this character, in the absence of unequivocal evidence to the contrary, a Court of equity will presume that the vendor did not trust to the property as a pledge for the security of his money, and hence, as he did not rely upon his equitable lien, that it has been abandoned."

Warvelle on Vendors (2d Edn.) pp. 828, 829, 830, parts of Sections 698 and 699.



Appellee's point five—

**A vendor's lien is not assignable and, therefore, the fact that Wallace attempted to give Hattie Hardesty Chapman his right to the part of the certificates issued for the north fifty-three feet, eight inches, was wholly ineffectual and caused a waiver of the lien.**

The facts of all the cases cited by appellee under this point show that the vendor attempted to assign his claim to a vendor's lien *after* the conveyance by him to his vendee and therefore after his claim to such lien arose. We do not dispute the correctness of the decisions in these cases.

In the case at bar, however, appellant and her agent, Wallace, joined in the conveyance of the whole of the land in question. Both the Referee in Bankruptcy (Referee's Certificate on Petition to Review, Tr. at p. 223) and the learned Judge of the Court below (opinion and order affirming order of referee, Tr. at p. 243) held that this procedure could not destroy appellant's right to her vendor's lien. The whole purchase price was made payable to the appellant, and, it is obvious, as said by the Referee in Bankruptcy, that the whole transaction was one between appellant and The Realty Union.

The evidence shows that Wallace was merely the agent of appellant and whatever he may have done in and about the transaction was simply preliminary. The final negotiation was had wholly between the appellant and The Realty Union. Anything

Wallace may have done before such final negotiation would, of course, be merged in the transaction between appellant and The Realty Union.

If, however, Wallace is to be considered as the owner of the small portion of the land which stood in his name at the time of the conveyance by him and appellant, jointly, to The Realty Union, it was entirely competent for him to contract that the whole purchase price should be payable to a third person and that such third person should have the vendor's lien arising out of his conveyance.

“It is competent for the vendor and vendee of land to contract that the latter shall pay the purchase price or part of it to some other designated person, and when it is so agreed, such other person may enforce against the vendee such rights as it was intended he should have. So where land is sold by title bond which provides that the whole or a part of the consideration shall be paid to a third person named, the legal title retained by the vendor inures to the benefit of the third person and he has a lien on the land for the sum required to be paid him. Therefore when the note of the vendee is made to one other than the vendor, the vendor's lien is not affected, the same as if he had taken the note and assigned it, with any intention of abandoning his lien. *Zwingle vs. Wilkinson*, 94 Tenn. 256; 28 S. W. 1096; *De Bruhl vs. Maas*, 54 Tex. 464; *Jones vs. Perkins*, 59 Tex. 300;”

Note to *Royal Con. Min. Co. vs. Royal Con. Mines* in 137 Am. St. Rep. 165 *et seq.*;

See Warville on Vendors (2d Edn.) Sec. 685,  
p. 815;

*Zeiser vs. Cohn*, 207 N. Y. 407, 101 N. E. 184.

*DeLong vs. Marshall*, 66 Fla. 410, 63 So. 723.

“Although the general rule is that a vendor’s lien on real estate for the purchase money is given to the person who owns the title and conveys, it is not indispensable that the legal title should have been vested in the party who claims the lien, nor that the deed or conveyance should have been actually executed by him. If he is the owner of the land in equity, and controls the legal title, and causes the conveyance to be made by the holder of the legal title to a third party, and is entitled to the purchase money, he is entitled to a vendor’s lien therefor.”

*Syl. Loomis vs. Davenport*, 17 Fed. 301;

*Brisco vs. Minah Con. Min. Co.*, 82 Fed. at  
p. 955.

In conclusion, we submit that none of the points made by counsel for appellee herein is tenable and we reiterate and urge our contention that the Court below was not justified in drawing the inference and conclusion from the evidence adduced in this case that appellant joined in the speculative schemes of The Realty Union and threw her land into a “common pot.”

Counsel for appellee, at the oral argument of the case, stated that “appellant lay back for about three years after selling her land and, then, when she

thought the Realty Union was in a bad way, sought to secure herself at the expense of others."

This is not so. The notes given appellant by the Realty Union were not to mature until ten years after date. As long as the interest agreed upon was paid regularly, appellant was justified in her position. It was only when the Realty Union failed to meet its obligations that appellant could pursue her remedy. The case of *Finnell vs. Finnell*, 156 Cal. 589, a case in which a ten year note formed the basis of the claim, and a case in which the lien claimant waited until *one day* before the lapsing of the time limited by statute before bringing his action, is a most instructive case on all the questions involved in the case at bar.

This case and the case of *Royal Min. Co. vs. Royal Con. Mines Co.*, 157 Cal., 737, are fully discussed and annotated in the report of the latter case in 137 Am. St. Rep. 165. In the syllabus in that report the distinction between the case at bar and a case in which the vendor is a participant in the general scheme of the vendee and the vendee's grantees is clearly pointed out:

"Where a corporation conveys mines free of incumbrance to an individual to form a corporation and transfer the property unincumbered to it, and the latter corporation is to issue and sell its shares in an amount above three times what the selling corporation is willing to take for the property, and ninety per cent of the shares are to be deposited in a bank to be



dealt with in a specified manner, and a stated proportion of the sum realized on the sale of shares and from the operation of the mines is to go in satisfaction of the consideration stated in the agreement, the transaction is inconsistent with existence of a vendor's lien."

Undoubtedly, that is so, and that is the case counsel for appellee seek to make of the case at bar. Risking the Court's criticism of our tiresome reiteration, we submit that neither the evidence in this case, nor any inference properly to be drawn from the evidence, will justify any conclusion except that appellant and The Realty Union were dealing as ordinary vendor and vendee in this matter and that appellant is entitled to her vendor's lien as claimed.

Respectfully,

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No. 3077

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

*Appellant,*

vs.

R. M. SIMS, Trustee in Bankruptcy of The  
Realty Union, a Corporation, Bankrupt.

*Appellee.*

## SUPPLEMENTAL BRIEF FOR APPELLEE

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Filed this.....day of April, 1918.

FRANK D. MONCKTON, *Clerk.*

By ..... *Deputy Clerk.*

FILED  
APR - 9 1918



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## SUPPLEMENTAL BRIEF FOR APPELLEE

No good purpose can be served by our repeating in this supplemental brief evidence which we have quoted or referred to in the BRIEF FOR APPELLEE. The appellant has now searched diligently through the pages of this evidence for something to show that appellee did not understand the nature of the deal she made and did not believe she was going into a common enterprise on an equal footing with others. A few quotations are set out, without reference to the balance of the testimony. The court is asked to infer from these quotations directly the contrary of what was inferred and found both by



the referee and by his Honor, Judge Rudkin, in the District Court. Judge Rudkin heard argument, had the entire record before him, and the briefs of the parties, and gave the case careful consideration. The referee and his Honor, Judge Rudkin, were in no way influenced by the tortuous testimony of the appellant. We proved that her agent was one Wallace; that this man knew all about the affairs of the Realty Syndicate upon which concern the Realty Union was patterned; that he knew all about the scheme and plan under which the Realty Syndicate had operated; that its certificate holders had in innumerable instances satisfied their demands with property as provided in their certificates; that he knew of the plan under which the Realty Union operated, that he knew each company engaged in the practice of issuing investment certificates for thousands of dollars upon the assurance that real property would be acquired which would stand as security for all the promises contained in the investment certificates and upon the common understanding that the moneys and property received from the certificate holders would be invested and held and later sold for the certificate holders. That was the idea imparted by the words "Realty Union;" that was the idea imparted by the word "investment" or by the words "installment investment," and, as pointed out in the BRIEF FOR APPELLEE, Roosevelt Johnson, who was vice president of the Realty Union at the time Hattie Hardesty Chapman put her heavily encumbered and involved property into the concern, testified that he fully explained to appellee that by making the transfer and

accepting the certificates she would thereby become interested in the properties of the company generally. She knew this. "Adroitly" calling these investment certificates "promissory notes" cannot dissipate the effect produced both by the nature of the transaction and by the manner and substance of the testimony of the appellant herself.

The case was decided below upon the sufficient ground that the nature of the deal justified an inference against an intent to retain a vendor's lien. But no answer has been made to our argument that a contract that very materially secured payment and which was in addition to a bald promise to pay a debt, was taken from the Realty Union; no answer has been made to the argument that in the event the company, in accordance with its obligation implied from the entire transaction, proceeded to sell its properties it would be compelled to accept on account of the price investment certificates and this, whether they were or were not matured. It is simply evading the circumstances to say that the provisions referred to amounted to nothing, for the very face of the certificate shows, and the oral testimony shows, the transaction contemplated the sale of land of the company; that thereby profits were to be made and the "dividends" in excess of the agreed interest were to be ratably distributed between the stockholders and the investment certificate holders. It is not essential to the making out of a case that the personal obligation of the vendee only was not looked to, to show that the security or way provided for bringing about the settlement of a debt, was

absolutely bound to accomplish such settlement. If the vendor looks other than to the *personal* obligation of the vendee as a means for bringing about the settlement of the debt, the vendor's lien is not preserved; the provisions for the security may be feeble; they may be contingent and uncertain. Particularly if they are recognized by the parties as essential provisions of the contract, a vendor's lien is not preserved. This rule is thoroughly settled and is declared in no state more emphatically than in the State of California. The appellant simply asks this court to convert these investment certificates into promissory notes. They were not mere promissory notes. The express and implied obligations in them were material and they were regarded and ultimately treated as being material by the parties. They conferred a right to an accounting. A relationship was created by them. They were private "scrip." The fact that financial stringency or financial difficulties caused the collapse of the enterprise does not alter the situation. Had the concern gone forward and had the rise in prices in Alameda County been continuous and in accordance with the expectations of the parties organizing the company, the company would have kept going; it would, from time to time, have disposed of its lands in accordance with its promises and the certificate holders could have demanded such land on the sale thereof; they could have matured their certificates and brought about a settlement thereof forthwith. The vendor's lien is fragile; if security other than the personal obligation of the vendee enters into the transaction, the lien is gone.

The main point of both the referee's decision and of the opinion of Judge Rudkin is that the transaction viewed as an entirety justifies the inference that there was no intent to retain vendor's lien. It certainly would be remarkable if those who turned land into this company and took investment certificates could wait four or five years and then announce to the company that they had concluded to assert a vendor's lien upon particular property. It is impossible to assume that such was the expectation of a vendor turning his property into this concern and receiving investment certificates therefor. No such a conclusion is permissible under all the conditions of the transfer, and it is utterly negated by the testimony of the appellant herself wherein she declares that she expected this company would proceed with the sale of the property and that it would fix its price in so doing, that she expected it was through sales just such as would be made of the property that she had turned in that she would be paid the excess interest or that profits would be made. The testimony of Mr. Johnson was that they talked over the nature of the business of this concern. The testimony of Mr. Wallace, the agent for the appellant, was that he was thoroughly familiar with the business of the concern. The "investors" were on an equal footing. They were "joint adventurers."

The circumstances of the transaction and the testimony of the appellant justify and require the inference that the surrender of the property was absolute. It was hopelessly encumbered. There were mortgages, deeds of trust,



second mortgages, street liens, and attachments upon it, and appellant doubtless welcomed the turning over of the property to the company. Wallace testified that he thought there was some sort of conspiracy among the banks in Oakland to thwart his efforts to save the property from sale. Both he and the appellant were only too willing to accept the contracts for the property. Mr. Wallace was honest enough to refuse to state that the company ever considered giving anything for this property excepting its investment certificates. It would not give straight promissory notes. It exacted and required and appellant knowingly accepted the condition that she become an investor in a common enterprise. Conditions change. The corner in question becomes more nearly desirable business property. The Realty Union is threatened with bankruptcy. She hastens to an attorney. This attorney after deliberately reading the investment certificates, (and not for the purpose of any compromise, as is perfectly obvious), goes to the company to find out whether its properties are listed for sale. The company is in a bad way financially. It declines to give a list. The situation is then studied and a suit to enforce a vendor's lien is instituted upon certificates that would not mature for seven years. It is the only claim of the kind asserted in the matter of this bankruptcy. It is an attempt to repudiate a contract made in a deal deliberately entered into by the agent of the appellant for the very purpose of saving something out of the property for the appellant; it is an attempt to eliminate every feature from the transaction except a promise to pay money.

Equity will not enforce an inequitable demand, and the demand in question is most inequitable. It is admitted in the supplemental brief filed for appellant that the records showed that investment certificates amounting to many thousands of dollars were issued after the transfer of the property. It is with bad grace that the appellant comes into court and attempts to take some little measure of relief from other certificate holders. She knew when she turned the land over to the company that it was valuing its property, issuing circulars, and disposing of its investment certificates as if it had the power to sell, and as if it was the absolute owner of the very land in question. Faith in the company's ownership of its properties was of course the basis upon which it disposed of the certificates. We have shown that where property is turned over to be used as the basis of an investment by others, no lien is retained.

It is law of California that the lien is not assignable.

"The lien thus created is not a specific absolute charge upon real property; it is *personal* to the vendor, and does not pass by a transfer of his claim for the purchase money."

Gessner vs. Palmateer, 89 Cal., 92

"Indeed, with the exception of decisions in two or three states, the adjudged cases are uniformly against any assignment of the lien by a transfer of the note or other personal security of the vendee. \* \* \* The cases which deny that the lien passes with the personal security of the vendee do not rest except in a few cases upon the want of a special assignment from the vendor, **but upon the ground that the lien is in its nature inassignable**; and to that conclusion

we have arrived \* \* \* \* \*. The assignee of a note given for the purchase money stands in a very different position. He has not parted with the property which he seeks to reach \* \* \* \* \*. It is indispensably necessary, says Chancellor Blood, to the existence of such a lien, that the parties should stand in the relation to each other of vendor and vendee of real estate \* \* \* \* \*. If the relationship is in any manner whatever put off, altered, or relinquished, an equitable lien either cannot arise, or will be destroyed," etc.

Baum vs. Grigsby, 21 Cal., 176, 177.

It is conceded that title to the northerly portion of the property never vested in the appellant. It would take a deed, contract in writing, to do that. Wallace turned his property in with property that belonged to the appellant. It was all one transaction. The Wallace lot did not extend entirely to the rear of the whole lot. The lien is unassignable. It is allowed solely as a protection to a vendor. If it is unassignable, it is a departure from the law and a circumvention of the law to allow it in favor of one to whom the vendee promises to pay the purchase price at the instance of the vendor. Such a person is not a vendor. The transaction amounts to nothing more than an indirect assignment of the lien. The lien being unassignable, no lien could attach to the property which Wallace turned over and it further results in view of the fact that the transaction was entire, and there was no apportionment of the price so that a part of it could be said to appertain to the lot in the northwest corner of the main lot, that no lien at all could exist. This we mentioned at the oral argument and we renew the contention

here. The point made is similar to the point that where the price covers real and personal property and there is no apportionment no lien upon the land can be preserved.

Welch vs. Farmers' Loan and Trust Co., 165  
Fed., 561-565.

Respectfully submitted,

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